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Supreme Court of the United States

OCTOBER TERM, 1963

No. 592

COCHEYSE J. GRIFFIN, ETC., ET AL.,
PETITIONERS,

vs.

COUNTY SCHOOL BOARD OF PRINCE EDWARD
COUNTY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 30, 1963

CERTIORARI GRANTED JANUARY 6, 1964

SUPREME COURT OF THE UNITED STATES

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

United States District Court

for the Eastern District of Virginia at Richmond

Civil No. 1333

EVA ALLEN, *et al.*,

Plaintiffs,

—v.—

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, VIRGINIA, *et al.*,

Defendants.

Docket Entries

Date 1960	Proceedings

Apr. 22—Order on Mandate (of May 5, 1959), ent'd & filed, retaining action on docket for further proceedings & etc. (Bryan, J.).

Apr. 27—Motion to withdraw appearance as counsel for County School Board of Prince Edward Co., filed by Hunton, Wms., Gay, Powell & Gibson, & Archibald G. Robertson, Jno W. Riely & T. Justin Moore, Jr. (members of the firm) and W. C. Fitzpatrick.

May 17—Order permitting Archibald G. Robertson, Jno W. Riely & T. Justin Moore, Jr. (members of the firm of Hunton, Wms., Gay, Powell & Gibson) & W. C. Fitzpatrick to withdraw as counsel for County School Board of Prince Edward Co., Va., ent. & filed May 17, 1960. Notice mailed counsel.

Docket Entries

Date 1960	Proceedings
June 13	Motion for leave to file supplemental complaint and to add additional defendants received & filed 6/10/60.
June 13	Supplemental Complaint received 6/10/60.
June 13	Motion to intervene received 6/10/60.
June 13	Complaint in intervention received, 6/10/60.
June 17	Notice of Motion & Motion to dismiss motion for leave to file . Supplemental Complaint filed.
June 21	Motion for continuance of Hearing on motion for Intervention & on motion to add additional Defts. & for leave to file supplemental complaint filed by deft. Geo. W. Palmer, member of School Bd. of Prince Edw. Co.
June 27	In chambers—before Orwin R. Lewis, Judge; appearance by counsel. Pending motions, after argument, continued to July 29, 1960 at 10 o'clock.
July 8	Motion of Harold P. White, Jr., etc., et al. to intervene and notice of motion, filed.
July 8	Notice of motion for hearing on motion to intervene and to file supplemental complaint, filed.
July 29	In Open Court—Lewis, J.: appearances by counsel. Plaintiffs moved to dismiss Geo. W. Palmer as party in so far as it dismisses Palmer as an individual only. Motion for leave to file supplemental complaint and add additional defendants argued by plaintiffs Collins Denny, Jr. moved for continuance. Motion denied. Argument concluded. Court takes time to consider.

Docket Entries

Date	Proceedings
1960	
Sept. 16	Order entered 9-16-60, as follows: leave is granted to plaintiffs to file their supplemental complaint; making State Board of Education, Supt. of Public Instruction and Bd. of Supervisors of Prince Edward County, parties deft. to this suit, each of them to be served with copies of the original and supplemental complaints; granting defts. 20 days from 9-16-60 to file such answers and/or other pleadings to the supplemental complaint as they deem advised; reserving ruling on motion to dismiss supplemental complaint as to T. J. McIllwaine, without prejudice to his right to renew the motion at a later date; granting motion of George W. Palmer that he be dismissed as a party deft. in his individual capacity, but he shall remain a party deft. as a member of the School Board of Prince Edward County; granting motions of Harold P. White, Jr., and others, and Cocheyse J. Griffin, and others, that they be permitted to intervene as parties plaintiff and the persons named therein are herewith made parties plaintiff, and filed.
Sept. 16	Supplemental complaint filed.
Sept. 21	Summons issued to State Bd. of Education, Supt. of Public Instruction & Bd. of Supervisors of Prince Edward Co., returnable 10-6-60.
Oct. 5	Motion for leave to withdraw as counsel for deft., T. J. McIllwaine filed by Hunton, Wms., Gay, Powell & Gibson, Archibald G. Robertson, Jno W. Riely, Jr. & T. Justin Moore, Jr.
Oct. 5	Order permitting withdrawal of above counsel as counsel for deft. T. J. McIllwaine, ent. & filed. Notice mailed counsel.

Docket Entries

Date	Proceedings
1960	
Oct. 5	—Order extending time to 10-24-60 for deft. County School Bd. of Prince Edw. Co., Va., T. J. McIllwaine, Div. Supt. of Schools of Prince Edw. Co., Supt. of Public Instruction, State Board of Education & Bd. of Supervisors of Prince Edward Co., to file answers, ent. & filed. Notice mailed counsel.
Oct. 7	—Marshal's return on summons executed and filed as to all defendants.
Oct. 24	—Motion of Board of Supervisors of Pr. Edw. Co. to dismiss supplemental complaint as to said Board of Supervisors, filed.
Oct. 24	—Motion of Supt. of Public Instruction and State Board of Education to dismiss Supplemental Complaint, filed.
Oct. 24	—Motion of School Board of Prince Edward Co. to dismiss the supplemental complaint permitted to be filed by Order of Sept. 16, 1960, etc. filed.
Oct. 24	—Motion of T. J. McIllwaine to dismiss supplemental complaint permitted to be filed by order of Sept. 16, 1960 filed.
1961	
Jan. 13	—Motion of plf. for leave to file amended supplemental complaint and to substitute successor defts. & add party deft., filed.
Jan. 24	—Letter of Court to counsel fixing Feb. 15, 1961 at 2:00 p. m. to fix dates for hearing on motions, filed.

Docket Entries

Date	Proceedings
1961	
Feb. 15	In Open Court—Lewis, J.: appearances by counsel. April 11, 1961 at 2:00 p. m. set for argument on motion to file amended supplemental complaint. May 8, 1961 set for hearing on all other motions that are filed or may be filed and on any motions that may be filed if filing of amended supplemental complaint is allowed.
Apr. 11	In Open Court—Lewis, J.: Motion to file amended supplemental complaint argued and granted.
Apr. 24	Order substituting parties deft. & filing amended supplemental complaint, making J. W. Wilson, Jr., Treas. of Prince Edw. Co., Va. party deft. All defts. to file responsive pleadings on or before 5-1-61, ent. & filed. Copy of order & amended complaint del. to Marshal for service on J. W. Wilson, Jr. Notice 77d issued.
Apr. 24	Amended supplemental complaint filed.
Apr. 26	Motion to Intervene as a plf. and to add defendants Prince Edward School Foundation, Commonwealth of Va. & Sydney C. Day, Comptroller of Virginia, filed by United States.
Apr. 26	Memorandum of Points & Authorities in support of motion of U. S. to intervene & to add parties deft. filed by U. S.
Apr. 27	Notice of motion on 5-8-61 for U. S. to intervene as plf. etc., filed.
Apr. 28	Marshal's return of service executed on order & supplemental complaint as to J. W. Wilson, Jr., filed.
May 1	Motion to dismiss filed by State Board of Education.

Date 1961	Proceedings
May 1	—Motion of T. J. McIlwaine to dismiss amended supplemental complaint permitted to be filed by order of 4-24-61, etc. filed.
May 1	—Motion of School Board of Prince Edward Co. to dismiss amended supplemental complaint permitted to be filed by order of 4-24-61, etc. filed.
May 1	—Motion of J. W. Wilson, Sr., Treas. of Prince Edward Co. to dismiss amended supplemental complaint filed.
May 1	—Motion of Board of Supervisors of Prince Edward Co. to dismiss amended supplemental complaint filed.
May 1	—Marshal's return on writ as to Atty. General executed & filed.
May 1	—Marshal's return on writ as to J. Barrye Wall, Jr. executed & filed.
May 1	—Marshal's return on writ as to Sidney C. Day, Jr. executed & filed.
May 3	—Motion to intervene as a deft. filed by John Bradley Minnick & to file answer to complaint of U. S. to intervene, filed.
May 3	—Memorandum of Points & Authorities in support of motion to intervene filed by John Bradley Minnick.
May 8	—In Open Court—Lewis, J.: Appearances by counsel. Motions to dismiss amended and supplemental complaint of plaintiffs argued. Attorney General of Virginia moved for continuance of Gov't. motion to intervene. Motions denied. Gov't. motion partly argued by Gov't. counsel.

Docket Entries

Date 1961	Proceedings
May 9	In Open Court—Lewis, J.: Appearances by counsel. Arguments concluded. Briefs to be filed.
May 24	Memorandum of Law filed by U. S.
May 24	Plaintiffs' Brief in opposition to motions to dismiss filed.
May 24	Memorandum in opposition to motion to intervene as a plf. and to add defts., filed by Atty. Gen.
May 24	Memorandum in support of motion to dismiss on behalf of the Supt. of Public Instruction and the State Bd. of Education, filed.
June 2	Memorandum as to Intervention of Right under Rule 24(a)(2) filed by Atty. Gen. of Va.
June 5	Letter of Court to counsel allowing Oliver W. Hill to withdraw as counsel, filed.
June 15	Memorandum opinion by the Court denying motion of United States to intervene as a party plaintiff and to add as parties defendant, Prince Edward School Foundation, Commonwealth of Virginia and Sydney C. Day, Jr., Comptroller of Virginia, entered June 14, 1961.
June 15	Opinion by the court denying without prejudice, motions to dismiss amended supplemental complaint, etc., granting defendants 20 days to answer or plead, fixing date for hearing on merits and fixing tentative date for formal pre-trial, etc., entered June 14, 1961.
June 15	Motion of County School Board of Prince Edward County to file report, with notice attached and report attached, filed June 15, 1961.
July 5	Answer of State Board of Education to amended supplemental complaint filed.

Docket Entries

Date 1961	Proceedings
July 5	**Answer of School Board of Prince Edward Co. to amended supplemental complaint filed.**
July 5	**Answer of T. J. McIlwaine to amended supplemental complaint filed.**
July 5	**Answer of J. W. Wilson, Jr., Treas. of Prince Edward Co., Va. to amended supplemental complant filed.**
July 5	**Answer of the Board of Supervisors of Prince Edward Co. to amended supplemental complaint filed.**
July 7	**Order denying motions to dismiss supplemental complaint, without prejudice to rights of defts. to renew their motions upon conclusion of hearing if they are then so advised; defts. to file answer or other pleadings to amended supplemental complaint within 20 days from 6-14-61; pre-trial proceedings as provided and scheduled in court's memorandum be observed; cause to be heard on merits 7-24-61; noting retirement from this cause as counsel for plfs.: Oliver W. Hill, Spottswood W. Robinson, III and Frank D. Reeves; ent. and filed.**
July 7	**Order denying motion of U. S. to intervene as party plf. & to add as parties deft. Prince Edward School Foundation, Com. of Va. & Sidney C. Day, Jr., Comptroller of Va. ent. 7-5-61, filed.**
July 24	Trial Proceedings—Before Hon. Oren R. Lewis, **Judge: Appearances by parties. Issues joined on all matters at issue. (Counsel appearing: S. W. Tucker & Robt. W. Carter, p.q.; J. Segar Gravatt, Frank N. Watkins, Frederick T. Gray, Attorney General of Virginia with R. D. McIlwaine, Collins Denny, Jr. with John F. Kay, Jr.; William C. King, p.d.).**

Date 1961	Proceedings
	Mr. Denny moved for leave to file report. S. W. Tucker opposed motion. Motion granted and report ordered received and filed. Report of School Board of Prince Edward County, Virginia, filed.
	In re: Motion of J. B. Minnick of May 3, 1961 to intervene: Opinion from Bench that motion should be denied and motion denied. Plaintiffs adduced evidence. Adjournment.
July 25—	Trial Proceedings—resumed: Parties again appeared. Bill for certified copies amounting to $159.00 filed by defendant, School Board. Plaintiffs adduced further evidence and rested. Adjournment.
July 26—	Trial Proceedings—resumed: Parties again appeared. Defendants adduced evidence and rested. Evidence concluded. Mr. Collins Denny moved to dismiss Supplemental and Amended Complaint re: Prince Edward School Board and Division Superintendent of School Board. Motion argued and ruling deferred until all arguments are completed. Mr. Denny reiterated motions previously made. Rulings deferred. Mr. J. Segar Gravatt renewed previous motions on behalf of Board of Supervisors. Rulings deferred. Matter partly argued. Adjournment.
July 27—	Trial Proceedings — resumed and concluded: Parties again appeared. Argument concluded. Decision reserved. Adjournment.
Aug. 7—	Summary of principles relied upon by Board of Supervisors of Prince Edward Co. received.

Docket Entries

Date	Proceedings
1961	
Aug. 25—	Memorandum opinion by the Court entered Aug. 23, 1961 and filed August 25, 1961 at nine o'clock A. M.
Sept. 29—	Statement of Court Reporter in sum of $338.00 to be taxed in costs, received.
Nov. 6—	In Chambers—Lewis, J.: Settlement of order argued.
Nov. 13—	Letter of J. Segar Gravatt showing payment to C. L. Craig, Reporter in sum of $338.00 received.
Nov. 15—	Notice of Application for writ of mandamus, with copy of petition for writ of mandamus of Leslie Francis Griffin, Jr., and copy of answer to petition for writ of mandamus, filed Nov. 13, 1961.
Nov. 15—	Order that report of County School Board of Prince Edward County and T. J. McIlwaine, Division Superintendent of Schools of said County, be received and filed as a part of the record, ent. and filed.
Nov. 15—	Report of County School Board of Prince Edward County and T. J. McIlwaine, with Exhibits A, B, C and D attached, filed.
Nov. 17—	Order on opinion of Aug. 23, 1961 restraining "grant in aid" payments by Board of Supervisors and Treasurer of Prince Edward County, et al.; restraining Division Superintendent of Schools of Prince Edward County, the Superintendent of Public Instruction, et al. from processing or approving any applications for State scholarship grants; ordering Prince Edward County School Board to forthwith comply with order of April 22, 1961; denying prayer for injunctive relief in re: transfer or lease of school property; reserving decision upon all other issues raised in the

Date	Proceedings
1961	
	amended supplemental complaint and motions and answers of various defendants not specifically ruled upon; continuing cause, and directing clerk to mail attested copies of this order to sundry persons, entered and filed November 16, 1961.
Nov. 17	—Return of Clerk on order of Nov. 16, 1961, filed.
Dec. 6	—Reporter's Transcript of Trial Proceedings of July 24-27, 1961 (Vol. I), filed.
Dec. 6	—Reporter's Transcript of Trial Proceedings of July 24-27, 1961 (Vol. II), filed.
Dec. 15	—Notice of appeal from order entered Nov. 16, 1961 filed by Cocheyse J. Griffin, et al.
1962	
Jan. 19	—Motion for extension of time to docket appeal record, filed 1-18-62.
Jan. 19	—Order extending time to Mch. 16, 1962 for docketing appeal, entered 1-18-62.
Jan. 19	—Appeal Bond of $250.00 filed by plfs.
Feb. 28	—Order of U. S. Court of Appeals ent'd. Feb. 26, 1962 postponing issues raised by the appeal noted Dec. 15, 1961 until final adjudication of the entire case by the district court and until appeal is noted and perfected from the district court's final adjudication, received and filed Feb. 28, 1962. (Clerk, USCA mailed copies of order to counsel.)
Mar. 20	—Notice of application for extension of injunction filed by plaintiffs in open Court in Alexandria.

Date 1962	Proceedings

Mar. 22—Proceedings in open court in Alexandria (Lewis, J.). Motion came on this morning for application of extension of the injunction heretofore entered. Motion continued until such time as the Court has been advised that a final order has been entered by the Supreme Court of Appeals of Virginia. The extension of injunction shall continue until such time as this order is handed down. When order is handed down this court will hear the motion as soon thereafter as possible.

Mar. 26—Motion to substitute Annie Dobie Peebles & C. Stuart Wheatley, Jr. parties deft. in substitution for Gladys V. V. Morton & Wm. J. Story, Jr., filed by plfs.

Mar. 26—Notice of motion for further relief filed by plfs.

Mar. 26—Motion for further relief & final disposition of this case, filed by plfs.

Apr. 2—In Open Court—Lewis, J.: Appearances by counsel. Plaintiffs, by counsel, moved court to enter order extending injunction and moved to have date for hearing on application for further relief. Court declined to rule at this time. Matter continued. Clerk to notify all counsel of record that counsel or someone from their offices shall appear on April 4th at 10:00 a.m. for purpose of setting date.

Apr. 4—In Open Court—Lewis, J.: Appearances by counsel. Copy of decision of Supreme Court of Appeals of Virginia, filed. Plaintiffs, by counsel, moved to extend injunction. Opposed by defendants. Defendants allowed until May 1, 1962 to file their motions. Leave granted to file motion

Date 1962	Proceedings
	to dissolve existing injunction. Plaintiffs to file any motions by April 16, 1962. Court to enter order effective today enlarging present injunction to remain in full force and effect until further order of this court. All motions now filed or that may be filed set for hearing on May 18, 1962.
May 1	—Motion of defendants to dismiss or in the alternative to abstain from determining the issues presented in the amended supplemental complaint and to dismiss plaintiffs' motion for further relief, with exhibits "A", "B", "C", "D", & "E", filed.
May 1	—Motion of defendants Board of Supervisors of Prince Edward County, Virginia, and J. W. Wilson, Jr., Treasurer of Prince Edward County, Virginia, to dismiss the injunction entered herein on November 16, 1961, and further extended by order of , 1962, filed.
May 1	—Motion to dismiss motion for further relief; Motion to stay until questions of State Constitutional and Statutory construction raised therein are submitted to the supreme court of appeals of Virginia for construction; and Answer of the Board of Supervisors of Prince Edward County, Virginia, and J. W. Wilson, Jr., Treasurer thereto, filed.
May 1	—Motion of defendants County School Board of Prince Edward County, Virginia, and T. J. McIllwaine, Division Superintendent of Schools to dismiss the amended supplemental complaint for failure of proof, filed.

Docket Entries

Date 1962	Proceedings
May 1	Motion of defendants, County School Board of Prince Edward County, Virginia and T. J. McIllwaine, Division Superintendent of Public Schools, to Dismiss plaintiffs' motion for further relief, filed.
May 1	Answer of County School Board of Prince Edward County, Virginia, and T. J. McIllwaine, Division Superintendent of Schools, to a motion for further relief filed herein by the plaintiffs, filed.
May 1	Motion to dismiss filed by Woodrow W. Wilkerson, Colgate W. Darden, Lewis F. Powell, Jr., Ann Dobie Peebles, C. Stuart Wheatley, Jr., Leonard G. Muse, Louise F. Galleher and Mosby Garland Perrow, Jr., ind. and constituting the State Board of Education.
May 1	Answer of Woodrow W. Wilkerson, Supt. of Public Instruction, and Colgate W. Darden, Lewis F. Powell, Jr., Anne Dobie Peebles, C. Stuart Wheatley, Jr., Leonard G. Muse, Louise F. Galleher and Mosby Garland Perrow, Jr., ind. and constituting the State Board of Education, filed.
May 18	In Open Court—Lewis, J.: Appearances by counsel. Matter of filing action in Supreme Court of Appeals of Virginia for a determination under Sec. 129 of the Constitution of Virginia and motion to dismiss amended supplemental complaint argued by counsel.
May 23	Plaintiffs' Exceptions to entry of summary judgment, filed.

Docket Entries

Date 1962	Proceedings
May 25	Order granting motion for summary judgment as to cause of action alleged in Sec. V of the Amended Supplemental Complaint and dismissing sec. V; directing clerk to enter final judgment, ent. & filed May 24, 1962.
May 25	Final judgment in favor of School Board on the cause of action alleged in Sec. V of the Amended Supplemental Complaint, entered by Clerk May 25, 1962. Notice 77 D mailed counsel 6-8-62.
June 11	Notice of appeal from final judgment in favor of School Board on the cause of action alleged in Sec. V of the Amended Supplemental Complaint, filed by Cocheyse J. Griffin, et al., plaintiffs, filed.
June 26	Conference with counsel in chambers (Lewis, J.).
July 26	Memorandum opinion and Order of the Court directing School Board of Prince Edward County complete plans for admission of pupils in the elementary and high schools of the county without regard to race or color and to receive and consider applications to this end at the earliest practical date; proposed plans should be submitted to all counsel of record not later than 9-1-62 and to this Court on 9-7-62; granting motion to substitute successor defendants; granting motion to dismiss motion for further relief; denying motion to dismiss injunction entered on 11-16-61, and further extended 3-26-62; said injunction is effective only so long as the public schools of Prince Edward County remain closed; ent. July 25, 1962. and filed.

Docket Entries

Date 1962	Proceedings

Sept. 7—In Open Court—Lewis, J.: Messrs. S. W. & Otto Tucker, Robt. Carter, Henry Marsh, for plaintiffs; Messrs. Button, McIlwaine, Gray, Denny, Kay, Hicks, Rogers, Watkins and Gravatt for defendants. Order filing report of School Board entered. Report of School Board filed. Exception to Report of School Board filed by plaintiffs. Exceptions argued. Other matters argued. Notice of School Board for entry of order with proposed order attached, filed.

Sept. 28—Reporter's Transcript of Proceedings in Open Court on Sept. 7, 1962 filed.

Oct. 11—Motion of defendants to amend the findings contained in the memorandum opinion of July 25, 1962, to rehear and reconsider in part that opinion, and to abstain, filed in Chambers at Alexandria October 3, 1962.

Suggestion Re Court's Order, filed in Chambers at Alexandria October 3, 1962.

Memorandum opinion and order denying in its entirety defendants' motion in Chambers that the Court amend its findings as set forth in its Memorandum Opinion of July 25, 1962 and to rehear and consider in part that opinion, and to abstain upon the grounds set forth in the motion; amending par. 2 of page 3, line 7 and and par. 2 of page 11, line 9 on oral motion of defendants and denying other requested amendments, entered and filed Oct. 10, 1962.

Order denying defendants' motion for stay; ordering School of Prince Edward County to submit the Pupil Placement Board assignment plan to the court forthwith for review and approval, if

Date	Proceedings
1962	
	the School Board relies upon the validity of the Plan; incorporating Court's Memorandum Opinion of July 25, 1962 as a part of this order by reference; setting forth previous findings by the court; adjudging that the public schools of Prince Edward County may not be closed to avoid the effect of the law as interpreted by the Supreme Court while the Commonwealth of Virginia permits other public schools to remain open; denying defendants' motion to dismiss, or in the alternative to abstain from determining the issues presented in the amended supplemental complaint; granting defendants' motion to dismiss the plaintiffs' motion for further relief; granting plaintiffs' motion to substitute successor defendants and substituting Anne Dobie Peebles and C. Stuart Wheatley, Jr., individually and as members of the State Board of Education for Gladys V. V. Morton and William J. Story as parties defendant; denying defendants' motion to dissolve the injunction of Nov. 16, 1961 which was further extended on March 26, 1962; extending injunction of Nov. 16, 1961 so long as the public schools of Prince Edward County remain closed; deferring entry of further orders as may be necessary and proper to require full compliance with this decree pending review by the United States Court of Appeals for the Fourth Circuit and the Supreme Court of the United States, providing such appeal is noted and perfected within the time provided by law, entered and filed October 10, 1962 (copies of this order and copy of opinion mailed counsel Oct. 11, 1962).
Oct. 17	—Notice of appeal filed by plfs. from order of 10-10-62.

Order On Mandate

As directed by the United States Court of Appeals for the Fourth Circuit, and upon motion of the plaintiffs, the defendants having advised the Court that they did not desire to be heard thereon, the Court does hereby ADJUDGE, ORDER and DECREE:

1. That the judgment entered by this Court on the 26th day of November, 1958, be, and it hereby is, vacated to the extent that it relieves defendants of the necessity of complying with the terms of the injunction heretofore entered in this case until the beginning of the school year 1965 and to the extent that it limits the recovery by the plaintiffs from the defendants to an amount chargeable for one copy of the transcript of the proceedings.

2. That the defendants, the County School Board of Prince Edward County, T. J. McIlwaine, Division Superintendent of Schools of Prince Edward County, their agents and employees and successors in office, and all persons acting in concert with them, be, and they hereby are, restrained and enjoined from any action that regulates or affects on the basis of race or color the admission, enrollment or education of the infant plaintiffs, or any other Negro children similarly situated, to the high schools operated by the defendants in the County and that the defendants receive and consider the applications of such persons for admission to such high schools without regard to race or color.

3. That the defendants make plans for the admission of pupils in the elementary schools of the County without regard to race or color and to receive and consider applications to this end at the earliest practical day.

4. This decree does not relieve the plaintiffs, and other persons similarly situated, of the necessity of observing state laws as to the assignment of pupils to classes in the

public schools of the County so long as such laws do not cause or allow discrimination based on race or color, and the administrative remedies provided in such laws must be exhausted before application is made to this Court for relief on the ground that this injunction is being violated.

5. That in addition to the costs heretofore allowed the plaintiffs they are hereby allowed the sum of $770.25 as additional costs for transcripts of the proceedings in this action.

6. That until the further order of this Court this action shall be retained on the docket of this Court for such further proceedings as may be necessary, and the Court reserves the power to enlarge, reduce or otherwise modify the provisions of this decree.

To which action of the Court, the defendants, by counsel, objected and excepted.

Dated: April 22, 1960

s/ ALBERT V. BRYAN
United States District Judge

Amended Supplemental Complaint

Plaintiffs present this, their supplemental complaint, leave having been granted by this Court to do so, against the County School Board of Prince Edward County, Virginia, T. J. McIlwaine, Division Superintendent of Schools of Prince Edward County, The Board of Supervisors of Prince Edward County, Virginia, J. W. Wilson, Jr., Treasurer of Prince Edward County, Virginia, Garland Gray, Lewis F. Powell, Jr., Gladys V. V. Morton, William J. Story, Jr., Leonard G. Muse, Louise F. Galleher, and Mosby Garland Perrow, Jr., individually and as constituting the State Board of Education, and Woodrow W. Wilkerson, Superintendent of Public Instruction, and aver as follows:

I

1. On May 5, 1959, the United States Court of Appeals for the Fourth Circuit reversed and remanded the judgment theretofore entered in this case and directed this Court to enter an order requiring defendant School Board and Division Superintendent of Schools to commence the desegregation of the public schools of Prince Edward County in September 1959. As required by said mandate this Court, by order entered the 22nd day of April, 1960, restrained and enjoined the defendants The County School Board of Prince Edward County and T. J. McIlwaine, Division Superintendent of Schools of Prince Edward County, and all persons acting in concert with them, from any action that regulates or affects on the basis of race or color the admission, enrollment or education of the infant plaintiffs, or any other Negro children similarly situated, to the high schools operated by said defendants in the county and required that said defendants receive and consider the applications of such persons for admission to such high schools without regard to race or color and make plans for the admission of pupils in the elementary schools of the

county without regard to race or color and to receive and consider applications to such end at the earliest practical day.

2. All public schools in Prince Edward County have been and have remained closed since the end of the 1958-59 school term. An efficient system of public free schools is established and maintained in every county and corporation in this Commonwealth, as required by §§ 129, 130, 132 and 136 of the Constitution of Virginia, other than in the County of Prince Edward. Consequently, the plaintiffs, and all members of the class which they represent, as well as all other children of public school age residing in Prince Edward County, have been and are being denied public free education contrary to and in violation of § 129 of the Constitution of Virginia and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States.

II

3. Section 136 of the Constitution of Virginia and §22-116 of the Code of Virginia, 1950, as amended, make it the duty of the Board of Supervisors of Prince Edward County to provide for the levy and collection of local school taxes and the appropriation of funds thus acquired to be apportioned and expended by the defendant School Board in establishing and maintaining public schools in said county.

4. Soon after the abovementioned remand of this case and in anticipation of the order of this Court which was thereafter entered, the defendant Board of Supervisors of Prince Edward County acting under purported discretionary power granted by legislation enacted at the Special Session of the General Assembly, 1959, to-wit, §22-127 of

the Code of Virginia of 1950, as amended, and notwithstanding the budgetary recommendation of the defendant School Board, failed and refused to make any levy or appropriation for public school purposes for the school year 1959-60. Moreover, the defendant Board of Supervisors has not made and does not intend to make any levy or appropriation for maintenance and operation of public free schools in the County of Prince Edward for the school year 1960-61, or any school year in the foreseeable future.

5. At its June 1959 meeting, said Board of Supervisors fixed the levies for the year 1959 at $1.60 per one hundred dollars of assessed valuation on all taxable real estate and tangible personal property located in the county elsewhere than in the Town of Farmville, where the levy on such property was fixed at $1.50 per one hundred dollars of assessed valuation, and at $0.30 per one hundred dollars of assessed valuation on all personal property classified as merchants' capital invested in businesses located in said county. The corresponding levies for the years 1957 and 1958 were and had been $3.40, $3.30 and $0.80, respectively.

6. Sometime after the decision of the Supreme Court in this case, there was created in said county an organization known as Prince Edward School Foundation, the purpose of which is to operate elementary and secondary schools in said county in partial substitution for public schools, thus to provide education for white children residing in said county. Since the beginning of the school term 1959-60, said foundation has operated such a school or such schools in said county for white children, representing such school or schools as being private, non-profit and non-sectarian. No other person, firm, association or corporation is known or believed to have operated a private, non-profit, non-sectarian school of elementary or secondary level in said county at any time since the beginning of the school

year 1959-60 or at any prior time which would be material here.

7. At its June 1960 meeting said Board of Supervisors fixed the levies for the year 1960 at $4.00 per one hundred dollars of assessed valuation on all taxable real estate and tangible personal property located in said county elsewhere than in the Town of Farmville, where the levy on such property was fixed at $3.90 per one hundred dollars of assessed valuation, and at $0.80 per one hundred dollars of assessed valuation on all personal property classified as merchants' capital invested in businesses located in said county.

8. At its said June 1960 meeting, said Board of Supervisors proposed and at its meeting held July 18, 1960 it enacted an ordinance (adopted under Chapter 191, Acts of the General Assembly of 1960, being §58-19.1 of the Code of Virginia) to provide that contributions made by persons to certain non-profit, non-sectarian private schools shall constitute a credit against the liability of any such person for certain taxes otherwise payable to Prince Edward County, etc. Among other things said ordinance provides that upon receipt of the taxpayer's affidavit of the fact of such contribution and related matters and supporting evidence of payment, the Treasurer of the County of Prince Edward "shall deduct from the amount of taxes due the County of Prince Edward by such person, firm, association, corporation or other taxpayer on account of real estate taxes or personal property taxes the amount of such contribution, in no event to exceed 25 per centum of the total taxes due the County of Prince Edward on real estate and personal property by such taxpayer." A copy of said ordinance as, prior to its enactment, it was published in the Farmville Herald, a newspaper published in said county, is herewith filed, marked "Exhibit 'Supp. A' ".

9. At its said June 1960 meeting said Board of Supervisors proposed, and at its meeting held July 18, 1960, it enacted an ordinance (adopted under Chapter 461, Acts of the General Assembly of 1960, being §22-115.37 of the Code of Virginia) "to encourage the education of certain children in Prince Edward County by appropriating funds for educational purposes in furthering the elementary and secondary education of such children", etc. A copy of said ordinance as, prior to its enactment, it was published in said Farmville Herald, is herewith filed, marked "Exhibit 'Supp. B.'" Pursuant to this ordinance said Board of Supervisors by resolution passed at subsequent meetings has appropriated and caused to be paid from the general tax fund sums of money, averaging $50.00 for each child, aggregating more than $65,000.00, all or most of which was paid to or in reimbursement for sums paid to said Prince Edward School Foundation for education of white children residing in said county.

10. At and prior to the time of the proposal of the above-mentioned ordinances and at all times thereafter, said Board of Supervisors and each member thereof knew that the only person, firm, association or corporation which operated or claimed to operate a private, non-profit, nonsectarian school of elementary or secondry level located within said county was the said Prince Edward School Foundation, that said Foundation was organized to provide educational opportunities for white children only, and that said Foundation had been organized for the purpose of avoiding the attendance of white children and colored children at the same public schools. The enactment and execution of said ordinances serve merely to provide, within said county and at public expense, elementary and secondary education for white children residing in said county while such education for Negro children similarly situated is totally denied.

11. The foregoing actions of the defendant Board of Supervisors result from and reflect a deliberate, intentional and calculated purpose to circumvent and frustrate the order of this Court as anticipated at the time the Board first failed and refused to appropriate money for public schools for the 1959-60 session and as thereafter entered. The aforesaid action by the defendant Board of Supervisors has rendered and will render said order unenforceable and ineffective unless the relief prayed herein is granted.

III

12. J. W. Wilson, Jr., is the Treasurer of the County of Prince Edward. On information and belief, plaintiffs allege that, under purported authority of the ordinance mentioned and referred to in paragraph numbered 9, he has given tax credits for contributions made to said Prince Edward School Foundation and, unless restrained, will continue to do so.

IV

13. The Constitution of Virginia (Sections 130 through 135) creates the State Board of Education and the office of Superintendent of Public Instruction, vests the general supervision of the state-wide system of public free schools in said State Board, generally defines the powers and duties of said Board, provides for a permanent and perpetual literary fund (all or part of which the General Assembly may set aside for public school purposes), and gives to the State Board the management and investment of the school fund under regulations prescribed by law. With respect to the administration of the public free school system, further duties of the State Board of Education and of the Superintendent of Public Instruction are set forth in Title 22 [Education] of the Code of Virginia, as amended, e.g., §§ 22-1, 22-2, 22-6, 22-9.1, 22-9.2, 22-11 through 22-40, 22-72, 22-101 through 22-146.11, 22-159.

14. Neither the defendant State Board of Education, the defendant Superintendent of Public Instruction, nor any other State official acted to discharge the State's constitutional obligation to provide and maintain an efficient system of public free schools in Prince Edward County as required by §§ 129 to 136, inclusive, of the Constitution of Virginia and §§ 22-11 to 22-29, inclusive, of the Code of Virginia of 1950, as amended.

15. Plaintiffs, on information and belief, allege that, from funds which would have been available for public schools in Prince Edward County if public schools there were not closed, the State Board of Education has approved grants for the school year 1960-61 to more than one thousand white children in Prince Edward County in sums aggregating more than one hundred thousand dollars, in aid of the attendance of said children at the school or schools operated by said Prince Edward School Foundation.

V

16. Plaintiffs are informed, and on information and belief allege, that defendant County School Board is considering and contemplating the conveyance, lease or transfer of the public schools and public school property of Prince Edward County to some private corporation, partnership, association or individual pursuant to §§ 22-161, 22-164.1 and 22-164.2 of the Code of Virginia, as amended, and that the defendants by causing and permitting the public school facilities in said county to fall into disuse, and by other means as well, are making possible and encouraging the sale and conveyance of the public schools and public school property of said county pursuant to §§ 22-161.1 through 22-161.5 of the Code of Virginia of 1950, as amended.

VI

17. The hereinabove related action, inaction, and contemplated action of each and all of the defendants was, has been, and will be taken for the sole purpose of circumventing and frustrating the enforcement of the order of this Court requiring the racial desegregation of the public schools of Prince Edward County, in violation of the rights of these plaintiffs and the class they represent as guaranteed by the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States as established in this case.

18. Plaintiffs and those similarly situated and affected, are suffering irreparable injury and are threatened with irreparable injury in the future by reason of the hereinabove related action, inaction and contemplated action of each and all of the defendants. Plaintiffs have no plain, adequate or complete remedy to redress the wrongs and illegal acts herein complained of other than as herein prayed.

WHEREFORE, plaintiffs pray that the Court enter an order enjoining and restraining the defendants, their officers, agents, servants, employees, attorneys, successors or assigns, or persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise:

(a) From refusing to maintain and operate an efficient system of public free schools in Prince Edward County, Virginia;

(b) From expending public funds for the direct or indirect support of any private school which, for reason of race, excludes the infant plaintiffs and others similarly situated;

(c) From expending public funds in aid of, or in reimbursement of money paid for, the attendance of any

child at any private school which, for reason of race, excludes the infant plaintiffs and others similarly situated;

(d) From crediting any taxpayer with any amount paid or contributed to any private school which, for reason of race, excludes the infant plaintiffs and others similarly situated; and

(e) From conveying, leasing, or otherwise transferring title, possession or operation of the public schools and facilities incidental to the operation thereof in Prince Edward County, Virginia, to any private corporation, association, partnership or indivdual.

And plaintiffs further pray that they be allowed their costs and such other, further and general relief as the Court may deem justiciable.

S. W. TUCKER,
Of Counsel for Plaintiffs.

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Answer of School Board of Prince Edward County to Amended Supplemental Complaint

School Board of Prince Edward County, Virginia, answering the Amended Supplement Complaint permitted to be filed herein, avers:

I

1. It admits that the United States Court of Appeals for the Fourth Circuit on May 5, 1959, reversed and remanded the judgment theretofore entered by this Court in this case and directed that this Court enter a certain order; the summation of that order found in paragraph No. 1 of the Amended Supplemental Complaint is not accurate; the nature and extent of the order directed to be entered is found in the opinion of said Court of Appeals.

2. It admits that on April 22, 1960, this Court entered an order as directed by the Court of Appeals, the pertinent provisions of which are set forth in the second sentence of paragraph No. 1 of the Amended Supplemental Complaint.

3. The original Complaint in this case was based upon the proposition that segregation of the races in the schools operated by this defendant violates the Federal Constitution and upon the further ground that if segregation accompanied by equality of treatment is valid, the facilities afforded colored pupils in the high schools operated by this defendant were grossly inferior to those furnished white pupils.

4. The latter ground was eliminated by the decision of the Supreme Court of the United States handed down May 17, 1954, wherein it was held that to such extent as the State may undertake to provide education, it must make the same available to all on equal terms without racial distinction.

Answer of School Board of Prince Edward County to Amended Supplemental Complaint

5. Neither said Supreme Court nor said Court of Appeals nor this Court has decided that this defendant must operate schools in Prince Edward County, Virginia, or that any "public" schools (public in the sense that they are owned and controlled by the Commonwealth of Virginia or any legal subdivision thereof) must be operated in Prince Edward County, Virginia.

6. The Amended Supplemental Complaint is based upon the fallacious assumption that the order of April 22, 1960, requires that this defendant operate schools in the County. At the time said order was entered, this defendant had not operated any schools since June of 1959; that was a fact of wide public knowledge; and it was known to the plaintiffs and their attorneys and it was known to this Court.

7. It admits the allegation of the first sentence of paragraph No. 2 of the Amended Supplemental Complaint.

8. It admits that in every other county, city, and town constituting a separate school district public schools are operated by the local school boards. The schools in the several districts are not uniform. Those operated by some local school boards are much more extensive and complete than those operated by other local school boards.

9. It is denied that §§129, 130, 132, and 136 of the Constitution of Virginia, or any other provisions of that Constitution, require the operation of public free schools in every location of the Commonwealth. Said Constitution does not require that public free schools be operated in every locality. It leaves to the locality whether any money will be raised by local taxes for the support of public schools, and the extent, if any, of the educational opportunities which will be furnished by a system of public free

schools, subject only to the qualification found in §136 of the Constitution that such primary schools as may be established in any school year shall be maintained at least four months of that school year before any part of such local monies is devoted to the establishment of schools of the higher grades.

10. It is denied that the plaintiffs or any other children of public school age residing in Prince Edward County are being denied any rights in violation of §129 of the Constitution of Virginia or of the Due Process or of the Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States.

II

11. With the exception of one clause in paragraph No. 4 of the Amended Supplemental Complaint, the allegations of Sections II, III, and IV of said Amended Supplemental Complaint relate to no action of this defendant, County School Board, and charge nothing against it. However, the Court having overruled the motion of this defendant to dismiss as to its said sections, this defendant believes it is incumbent upon it to answer those allegations.

III

12. It is denied that §136 of the Constitution of Virginia or that §22-116 of the Code of Virginia (Acts, 1928, page 1200) make it the duty of the Board of Supervisors of Prince Edward County to provide for the levy and collection of local school taxes and the appropriation of funds thus acquired to be apportioned and expended by this defendant in establishing and maintaining public schools in the County. Said sections, when properly construed, make

it discretionary with said Board of Supervisors whether it will levy and collect any such taxes.

13. Not only do the constitutional and statutory provisions now in effect in Virginia make it discretionary with the Board of Supervisors of Prince Edward County whether or not it will provide for the levy and collection of local school taxes, et cetera, but this defendant further avers that throughout the whole history of public schools in the Commonwealth of Virginia, from the very first act entitled "An Act to Establish Public Schools", adopted December 22, 1796 (see page 354 of "A Collection of All Such Acts of the General Assembly of Virginia of a Public and Permanent Nature as Are Now in Force" published pursuant to an Act of the General Assembly passed on the 26th day of January, 1802, generally referred to as the "Code of 1802"), it has been left to the discretion of county authorities whether any local taxes should be levied and collected for the support of public schools within the county.

14. As alleged in the first sentence paragraph No. 4 of said Amended Supplemental Complaint, it is admitted that this defendant made to the Board of Supervisors of the County budgetary recommendations of the estimate deemed to be needed for the support of public schools during the school year 1959-60 and in the alternative the amount of money deemed to be needed for educational purposes of the County pursuant to Acts of Assembly, Extra Session 1959, Chapter 79, Section 1, codified as §§22-120.3 and 22-120.4 of the Code of Virginia.

15. It is denied as alleged in said paragraph No. 4 of the Amended Supplemental Complaint that shortly after May 5, 1959, the Board of Supervisors of said County took any action under §22-127 of the Code of Virginia as amend-

ed (Acts, Extra Session 1959, Chapter 79, Section 1), or relied upon said section in failing or refusing to take any action. It is admitted that said Board of Supervisors made no levy or appropriation for public school purposes for the school year 1959-60.

16. With reference to the last sentence of paragraph No. 4 of the Amended Supplemental Complaint, this defendant admits that no levy or appropriation for maintenance and operation of public free schools in said County was made by said Board of Supervisors for the school year 1960-61 and that none has been made for the school year 1961-62.

17. This defendant admits the allegations of paragraph No. 5 of the Amended Supplemental Complaint.

18. This defendant admits that a number of citizens of the County organized a non-profit, non-stock corporation under the laws of the Commonwealth of Virginia known as Prince Edward School Foundation, and it says that said corporation was organized in May of 1959. This defendant avers that neither the Board of Supervisors of the County nor this defendant nor any official of said County participated in the organization of said Prince Edward School Foundation, controls or influences its actions, and neither this defendant nor said Board of Supervisors nor any official of said County is in any respect responsible for the activities and policies of said Foundation.

19. This defendant is not aware that the purpose of said Foundation is as alleged in the first sentence of paragraph No. 6 of the Amended Supplemental Complaint, and it, therefore, denies the allegations thereof.

20. This defendant admits that with the beginning of the school year 1959-60 said Foundation has operated pri-

vate, non-profit and non-sectarian schools in said County. In other respects it is not informed whether the allegations of the second sentence of paragraph No. 6 are true or false, and it, therefore, denies the same.

21. The allegations of the third sentence of paragraph No. 6 of the Amended Supplemental Complaint are denied.

22. This defendant admits the allegations of paragraph No. 7 of the Amended Supplemental Complaint.

23. This defendant neither admits nor denies the allegations of paragraph No. 8 of said Amended Supplemental Complaint and calls for strict proof of same.

24. This defendant neither admits nor denies the allegations of the first sentence of paragraph No. 9 of said Amended Supplemental Complaint and calls for strict proof of same.

25. This defendant is not informed of the accuracy of the allegations of the last sentence of paragraph 9 of the Amended Supplemental Complaint and, therefore, denies the same.

26. This defendant is not informed of the truth or falsity of the allegations of the first sentence of paragraph 10 of the Amended Supplemental Complaint and it, therefore, denies the same.

27. This defendant denies the allegations of the second sentence of paragraph No. 10 of said Amended Supplemental Complaint and says that those allegations are simply a figment of the imagination of counsel since said ordinances make no provision for white children as such and make no provision for colored children as such, but make provision for children residing in the County of any race

and color whatsoever. This defendant is advised that said ordinances are administered without reference to race, and equally for all children.

28. This defendant is not informed of the truth or falsity of the allegations of the first sentence of paragraph No. 11 of the Amended Supplemental Complaint and, therefore, denies the same. It further avers that the purpose of said Board of Supervisors is without legal consequence because the Board of Supervisors having been empowered by valid law to take the actions alleged, and the wisdom or lack of wisdom thereof being a political and not a judicial question, the purpose or the motive of the Board of Supervisors and of the individual members thereof is not a matter for judicial inquiry.

This defendant avers that said order has not been rendered unenforceable or ineffective by any action of the Board of Supervisors or any failure of said Board to act, but that said order is today in full force and effect in said County and is being obeyed by this defendant, and so far as this defendant is aware by every person and agency, public and private in the County, as well as in the Commonwealth.

IV

29. This defendant admits that J. W. Wilson, Jr., is Treasurer of the County of Prince Edward.

30. This defendant is not informed of the truth or falsity of the other allegations of paragraph No. 12 of the Amended Supplemental Complaint and, therefore, denies the same.

V.

31. This defendant avers that the content and scope of §§ 130 through 135 of the Constitution of Virginia are

not set forth with accuracy or with reasonable completeness in paragraph No. 13 of the Amended Supplemental Complaint. It says that the content and scope of said sections, as well as the provisions of the Virginia Code listed in said paragraph, are to be obtained from a perusal thereof.

32. The State Board of Education and the Superintendent of Public Instruction have no powers or duties save as the same are conferred by the Constitution or laws of Virginia. No provision of the Constitution of Virginia or of the law of Virginia lays on the Commonwealth of Virginia the obligation to provide and maintain public free schools in Prince Edward County. No provision of the Constitution of Virginia or the laws of Virginia lays upon the State Board of Education, the Superintendent of Public Instruction or any other official of the Commonwealth of Virginia the obligation to provide and maintain any public schools in the County of Prince Edward. The allegations of paragraph No. 14 of the Amended Supplemental Complaint are accordingly denied.

33. The defendant denies the allegations of paragraph No. 15 of the Amended Supplemental Complaint.

VI

34. This defendant denies the allegations of paragraphs Nos. 16, 17 and 18 of the Amended Supplemental Complaint.

VII

35. This defendant avers that it has not refused to maintain and operate public free schools in Prince Edward County, Virginia. It avers that there has been by this

defendant, and so far as it knows by others, no circumvention or frustration of the order of this Court entered on April 22, 1960, or attempt to circumvent or to frustrate it.

COLLINS DENNY, JR.
Of Counsel for Defendant, County School Board of Prince Edward County, Virginia

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Counsel for County School Board of Prince Edward County, Virginia

Answer of T. J. McIlwaine to Amended Supplemental Complaint

Your defendant, T. J. McIlwaine, Division Superintendent of Schools of Prince Edward County, Virginia, in answer to the Amended Supplemental Complaint avers:

1. Said Amended Supplemental Complaint makes no allegation concerning this defendant; it charges him with no action; it charges him with no dereliction; and it asks for no relief against him.

2. To such extent, if any, as the allegations of said Amended Supplemental Complaint have any reference to him or involve him, he adopts the answer filed by the County School Board of Prince Edward County, Virginia, to said Amended Supplemental Complaint.

T. J. McIlwaine,
By Collins Denny, Jr.,
Of Counsel.

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Collins Denny, Jr.

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C. F. Hicks
DeHardit, Martin & Hicks
Gloucester, Virginia
Counsel for T. J. McIlwaine.

Answer of the Board of Supervisors of Prince Edward County to Amended Supplemental Complaint

The defendant, the Board of Supervisors of Prince Edward County, Virginia, for answer to the Amended Supplemental Complaint says:

1. That all matters alleged in Paragraph 1 are of record in this action and the defendant relies upon said record.

It admits that insofar as it is informed public schools have not been operated in the County of Prince Edward since the conclusion of the school term 1958.

2. It denies that Sections 129, 130, 132 and 136 of the Constitution of Virginia requires the operation of schools in any county or corporation in the Commonwealth of Virginia.

It is not advised as to what schools are operated in other counties or corporations in the Commonwealth of Virginia, but denies that such schools as are operated in such other counties or corporations are operated in pursuance or by reason of the requirement of Sections 129, 130, 132 and 136 of the Constitution of Virginia.

It denies that Sections 129, 130, 132 and 136 of the Constitution of Virginia, or any other provision thereof, have been violated by action of this defendant. It denies that the complainants or any class of children or any child residing in Prince Edward County have or has been denied education in violation of the Constitution of Virginia or in violation of the Due Process or Equal Protection Clauses of the Fourteenth Amendment of the Constitution of the United States.

On the contrary, it alleges that its action with respect to public education and the offering of free education in the County of Prince Edward are in accord with lawful powers vested in it under the Constitution and Laws of the Com-

monwealth of Virginia and that in the exercise of these powers no rights of the complainants or any class of children or any child residing in Prince Edward County have been violated or denied.

3. It denies that Section 136 of the Constitution of Virginia and Section 22-116 of the Code of Virginia impose a mandatory or other duty upon the Board of Supervisors of Prince Edward County to levy, collect or appropriate taxes to be expended by the School Board of Prince Edward County in establishing and maintaining public schools in the said County.

On the contrary, it alleges that said sections along with other provisions of the Constitution of Virginia and of the Code of Virginia repose discretion with the Board of Supervisors with respect to the levy and collection of taxes and with respect to the appropriation of funds, the same having been collected.

It further alleges that the discretion reposed in the Board of Supervisors with respect to the levy and collection of taxes for public schools is not dependent upon any legislation enacted by the General Assembly of Virginia in recent years, but has been a discretionary power vested in the said Board of Supervisors of the counties and Councils of the cities and towns constituting school districts within the Commonwealth of Virginia since the inception of public support of education in the Commonwealth.

4. It admits that it has made no levy and has appropriated no funds derived from local revenue to the School Board of Prince Edward County for the operation of public schools.

It denies that it acted in pursuance of purported discretionary power granted it by legislation enacted at the

Special Session of the General Assembly 1959, to-wit, Section 22-127 of the Code of Virginia 1950, as amended, but avers that its action is in pursuance of discretionary powers vested in it under provisions of the Constitution of Virginia and under and by virtue of enactments of the General Assembly in force long prior to the issuance of original process in this action.

It further admits that it did not make a levy or appropriate funds to the School Board for the operation of public schools in 1960-61 and has not made such levy or appropriation for the year 1961-62, which action on its part it alleges is lawful in all respects.

5. It admits the allegations contained in Paragraph 5 and alleges that the said action is lawful in all respects.

6. It admits that the Prince Edward School Foundation operates private, non-profit, non-sectarian schools within the County of Prince Edward. It is not informed of the policies of the said Prince Edward School Foundation and, therefore, denies the allegation with respect thereto contained in the first sentence of Paragraph 6.

It denies that no other person, firm, association or corporation has operated private, non-profit, non-sectarian schools of elementary or secondary level within said County.

This defendant further avers that neither the Board of Supervisors of the County of Prince Edward nor any member thereof, nor any official of the said County participated in the organization of said Prince Edward School Foundation, nor does the said Board, any of its members, or any official of the County control or influence the action or policy of the said Foundation.

Answer of the Board of Supervisors of Prince Edward County to Amended Supplemental Complaint

7. Defendant admits the allegations contained in Paragraph 7.

8. It admits the adoption of the Ordinance mentioned in Paragraph 8 and files a certified copy herewith marked "Exhibit 'Ordinance 1' ".

9. The defendant admits the adoption of the Ordinance referred to in Paragraph 9 and files a certified copy herewith marked "Exhibit 'Ordinance 2' ".

It further admits that appropriations were made without regard to race, which, when taken with similar appropriations under State law, were adequate for the educational needs of all children of the said County without regard to race, that all such funds were paid to the parents or guardian of children entitled thereto without regard to the race of said child and without regard to the school wherein the child received educational training otherwise than as specified in said ordinance.

This defendant not being advised of the amount of money expended by parents and guardians of children residing within the County, nor of the amount received by such parents or guardians of children within said County from the State of Virginia or from any other source in furtherance of the educational needs of such children, and not being advised of the person, firm or corporation to whom such parents or guardians may have paid funds for the education of children residing within the said County, the allegation contained in the last sentence of Paragraph 9 is denied.

10. This defendant denies the allegations contained in Paragraph 10.

The defendant further alleges that the ordinances referred to in the said paragraph were enacted in furtherance

of education of children residing within the County of Prince Edward under powers vested in it under the Constitution of Virginia and Acts of the General Assembly of Virginia and for the equal benefit of all children of the said County without regard to race.

It denies that the effect of the said ordinance is to deny education to Negro children while providing the same for white children. On the contrary, it avers that the legal effect of the ordinances is to further educational opportunity of all children resident of the County without regard to race and to further the freedom of parents guaranteed under the First and Fifth Amendments of the Constitution of the United States to choose the school or schools in which their children should receive mental training; that the enactment of these ordinances in no way denied Negro children similarly situated any educational right, opportunity or privilege which was afforded to white children, and that any failure of Negro parents to take advantage of educational opportunities thus afforded is in no wise attributable to the enactment of said ordinances, but resulted solely from the free choice of the parents of said children.

11. This defendant denies the allegations contained in Paragraph 11.

It alleges further that its actions as alleged in the first ten paragraphs of the Amended Supplemental Complaint (1) were not intended and do not as a matter of law violate the order of this Court entered on April 22, 1960; (2) that all such actions were taken in pursuance of lawful discretionary power and authority vested in it under the Constitution of Virginia and Statutes enacted in pursuance thereof; (3) that such discretionary legislative power has been exercised in conformity with the Fourteenth Amend-

ment of the Constitution of the United States; (4) that such actions have been taken in furtherance of freedom of parents guaranteed by the First and Fifth Amendments of the Constitution of the United States with respect to the education and training of their children.

It further alleges that the order of this Court is in full force and effect within the County of Prince Edward and that the same has not been circumvented or frustrated, and that the actions of the Board of Supervisors do not constitute nor reflect a deliberate, intentional and calculated purpose to circumvent or frustrate said order.

12. This defendant admits that J. W. Wilson, Jr. is Treasurer of Prince Edward County, that his duties under and by virtue of the ordinances referred to in the Amended Supplemental Complaint are ministerial duties under the ordinances referred to.

13, 14 & 15. This defendant not being sufficiently advised as to the factual allegations contained in Paragraphs 13, 14 & 15 to form any belief with respect thereto deny all such factual allegations.

As to all allegations contained therein charging a constitutional obligation upon the State Board of Education or the Superintendent of Public Instruction to operate public free schools within the County of Prince Edward, the same are denied.

16. This defendant has no legal responsibility whatsoever with respect to the matters alleged in Paragraph 16 and is not sufficiently informed with respect to the factual allegations contained therein to form a belief with respect thereto and, therefore, denies the factual allegations therein contained.

Answer of the Board of Supervisors of Prince Edward County to Amended Supplemental Complaint

17. This defendant denies the allegations contained in Paragraph 17.

It further alleges that the order of this Court entered on April 22, 1960 has not been circumvented or frustrated, or that any rights of the plaintiff or the class they represent under the Due Process or Equal Protection Clause of the Fourteenth Amendment of the Constitution as established by the said order of April 22, 1960 have been violated or denied, and denies that it has acted independently or in concert with any other agency, person, firm or corporation for the purpose of circumventing or frustrating the enforcement of the order of April 22, 1960 and alleges that the actions charged against it in the Amended Supplemental Complaint are lawful actions under the laws and Constitution of Virginia and in furtherance of the individual freedom of parents with respect to the education of children guaranteed by the First and Fifth Amendments of the Constitution of the United States and that none of said actions violate any right of the plaintiffs or of any class of children within the County of Prince Edward under the Due Process or Equal Protection Clause of the Constitution of the United States.

18. It denies that the plaintiffs are suffering irreparable injury, or threatened with irreparable injury by reason of any action, inaction or contemplated action of this defendant, or of all of the co-defendants, in manner and form as alleged in the Amended Supplemental Complaint, but, on the contrary, it alleges that any alleged injury suffered has been the direct, voluntary and sole result of the choice and decision of the plaintiffs, and those similarly situated, or their parents, or of others in position to influence them, and is in no wise legally attributable to

this defendant, nor to all of the defendants, as alleged in the Amended Supplemental Complaint.

This defendant further alleges that the plaintiff has a plain, adequate and complete remedy for a redress of the alleged wrongs and illegal acts complained of in the Amended Supplemental Complaint by an action in the appropriate court or courts of the State of Virginia to enforce the alleged mandatory constitutional obligation alleged to rest upon this defendant and all other co-defendants under said Constitution and laws of the State of Virginia to operate free public schools within the County of Prince Edward, as set forth in the said Amended Supplemental Complaint.

THE BOARD OF SUPERVISORS OF PRINCE EDWARD COUNTY

By: FRANK NAT WATKINS
Commonwealth's Attorney of Prince Edward County

J. SEGAR GRAVATT
Special Counsel

Answer of J. W. Wilson, Jr., Treasurer of Prince Edward County, Virginia

The defendant, J. W. Wilson, Jr., Treasurer of Prince Edward County, Virginia, for answer to the Amended Supplemental Complaint says:

1. That he is the Treasurer of the County of Prince Edward.

2. That he knows nothing with respect to the allegations contained in the Amended Supplemental Complaint except as to the allegations contained in Paragraph 12 and Paragraph 17 of the said Amended Supplemental Complaint.

As to Paragraph 12, the said J. W. Wilson, Jr. admits that he has given tax credit for contributions made as provided by the ordinance mentioned in Paragraph 12 of the Amended Supplemental Complaint and that some of the tax credits have been for contributions made to the Prince Edward School Foundation; that his duties under the said ordinance are ministerial duties; that he stands ready to supply such information from the records of his office as the court may direct or as may be requested.

With respect to the allegation contained in Paragraph 17, he denies that he has acted with any purpose of circumventing or frustrating the enforcement of the order of this Court referred to in said paragraph in violation of the rights of the plaintiff, or of any other person, and denies that any action which he has taken, or any failure to act, or any contemplated action on his part has or will be taken for the purpose of circumventing and frustrating the order of this Court or in violation of the rights of any person.

J. W. Wilson, Jr.
By: J. Segar Gravatt,
His Attorney.

Answer of Woodrow W. Wilkerson, Superintendent of Public Instruction, *et al.*

Now come Woodrow W. Wilkerson, Superintendent of Public Instruction, and Colgate W. Darden, Lewis F. Powell, Jr., Gladys V. V. Morton, William J. Story, Jr., Leonard G. Muse, Louise F. Galleher and Mosby Garland Perrow, Jr., individually and constituting the State Board of Education, and answer the amended supplemental complaint herein and say:

1. For answer to Paragraph 1 of the amended supplemental complaint, these defendants say that the decision of the United States Court of Appeals for the Fourth Circuit in this case, dated May 5, 1959, and the order of this Court entered April 22, 1960, speak for themselves and no answer to said paragraph is required of these defendants.

2. The allegation of the first sentence of Paragraph 2 of the amended supplemental complaint is admitted; the remaining allegations of said Paragraph 2 are denied.

3. The allegations of Paragraph 3 of the amended supplemental complaint are denied.

4. These defendants neither admit nor deny the allegations of Paragraphs 4, 5, 6, 7, 8, 9 and 10 of the amended supplemental complaint.

5. The allegations of Paragraph 11 of the amended supplemental complaint are denied.

6. These defendants admit the allegation of the first sentence of Paragraph 12 of the amended supplemental complaint; the remaining allegations of said Paragraph 12 are neither admitted nor denied.

7. For answer to Paragraph 13 of the amended supplemental complaint, these defendants say that the various provisions of the Constitution of Virginia and Code of Virginia specified in said Paragraph 13 speak for themselves,

and no answer to the allegations of said Paragraph 13 is required of these defendants.

8. For answer to Paragraph 14 of the amended supplemental complaint, these defendants deny that they have failed to discharge any duty imposed upon them by any law of the Commonwealth of Virginia.

9. The allegations of Paragraph 15 of the amended supplemental complaint are denied.

10. These defendants neither admit nor deny the allegations of Paragraph 16 of the amended supplemental complaint.

11. The allegations of Paragraphs 17 and 18 of the amended supplemental complaint are denied.

Now, having fully answered, these defendants pray to be hence dismissed with their costs in this behalf expended.

WOODROW W. WILKERSON,
Superintendent of Public Instruction

COLGATE W. DARDEN
LEWIS F. POWELL, JR.
GLADYS V. V. MORTON
WILLIAM J. STORY, JR.
LEONARD G. MUSE
LOUISE F. GALLEHER
MOSBY GARLAND PERROW, JR.

Individually and Constituting
the State Board of Education

By: FREDERICK T. GRAY
Of Counsel

Frederick T. Gray
Attorney General of Virginia

R. D. McIlwaine, III
Assistant Attorney General

Supreme Court-State Library Building
Richmond 19, Virginia

Plaintiffs' Exhibit 24

(Resolution of the Board of Supervisors of Prince Edward County Dated 3 May 1956)

At a regular meeting of the Board of Supervisors of Prince Edward County held at the courthouse thereof on the 3rd day of May 1956, at which meeting all members of the board were present, the following resolutions were adopted unanimously:

I

BE IT RESOLVED BY THE BOARD OF SUPERVISORS, That we do hereby express to the people of Prince Edward County our gratitude that they have made known to this board so clearly their views upon the grave problems with which we are confronted with respect to our schools. The support of our people makes the burden of our responsibilities lighter and the course of our future action clearer. We trust the people of the county will continue to make known to us their views as we go forward to meet our problems together.

II

BE IT RESOLVED, That the Board of Supervisors of Prince Edward County as the elected representatives of the people of Prince Edward County, do hereby declare it to be the policy and intention of said board in accordance with the will of the people of said county that no tax levy shall be made upon the said people nor public revenue derived from local taxes shall be appropriated for the operation and maintenance of public schools in said county wherein white and colored children are taught together under any plan or arrangement whatsoever.

Plaintiffs' Exhibit 24

III

BE IT RESOLVED BY THE BOARD OF SUPERVISORS OF PRINCE EDWARD COUNTY, That the Governor of Virginia, the superintendent of public instruction, and the State Board of Education are hereby requested to pay any State revenue to the School Board of Prince Edward County in support of public schools in accordance with the policy adopted by the board of supervisors of said county for the payment of local revenues to said school board.

IV

BE IT FURTHER RESOLVED BY THE BOARD OF SUPERVISORS OF PRINCE EDWARD COUNTY, That the "Affirmation" signed by citizens and school patrons of the county is hereby received and directed to be filed with records of the board and it is further resolved that the "Statement of Convictions and Purposes" adopted by the citizens of this county present at this meeting (being approximately 250 in number) be received by the board and it is directed that the same be filed with the records of the board.

And the clerk of this board is directed to prepare copies of the affirmation with a statement attached thereto showing the number of the citizens whose names are signed thereto together with copies of the "Statement of Convictions and Purposes" and that one copy of each be transmitted to the School Board of Prince Edward County, the Governor of Virginia, the superintendent of public instruction, the attorney general of Virginia, the State Board of Education, Representative J. H. Daniel and Senator J. D. Hagood, together with a copy of this resolution, and of the resolution this day adopted stating the policy and intention of this board with respect to the levy of taxes and appropriation of local revenue for school purposes.

V

BE IT RESOLVED BY THE BOARD OF SUPERVISORS OF PRINCE EDWARD COUNTY, That the Governor be and he is hereby respectfully requested not to call a special session of the Legislature of Virginia for the purpose of presenting any legislative plan which would require, permit, or authorize under the laws of Virginia the teaching of white and Negro children together in the public schools of Prince Edward County.

HORACE ADAMS,
Clerk of the Board

Memorandum Opinion, Dated August 23, 1961

The issues raised, in this phase of the Prince Edward County school case, are:

Whether or not Prince Edward County can close and refuse to maintain its heretofore existing free public school system in order to avoid the racial discrimination prohibited by the Supreme Court of the United States, in Brown v. Board of Education, 347 U. S. 483; 349 U. S. 294; and

Whether or not the defendants, individually or in concert, have deliberately circumvented or attempted to circumvent or frustrate the order of this Court entered herein on the 22nd day of April, 1960.

In order to properly answer these questions it is necessary and appropriate to briefly review the history of this litigation.

This suit was originally instituted in 1951, and sought to enjoin the enforcement of the provisions of the Virginia Constitution and Code,[1] which required the segregation of

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[1] Virginia Constitution, Section 140, Code 22-221, 1950.

Negroes and whites in public schools. After years of litigation, the basic question raised therein was presented to the Supreme Court of the United States and was decided in a consolidated hearing, styled Brown v. Board of Education, 347 U. S. 483. The holding in that case was:

> "The Fourteenth Amendment forbids States to use their governmental powers to bar children on racial grounds from attending schools where there is state participation through any arrangement, management, funds or property." Cooper v. Aaron, 358 U. S. 1.

Thus the provisions of the Virginia Constitution and Code referred to were declared unconstitutional and void.

That this decision was unpopular in most of the South, is understating the fact. Most of the southern states, including Virginia, adopted new laws in order to meet the situation thus created. Many of these new laws were declared unconstitutional, both by the federal and state courts.[1]

In compliance with the Brown decision, supra, this Court entered an order enjoining the defendants from discriminating against the plaintiffs in admission to the public schools of Prince Edward County solely on account of race, and further directed the defendants to proceed promptly with the formulation of a plan to comply therewith, commencing with the opening of the school year 1965.

The Court of Appeals for the Fourth Circuit, under date of May 5, 1959, reversed this Court and remanded the case with directions to issue an order in accordance with that opinion, which provided, among other things, that the defendants be enjoined from any action that regulates or

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[1] Harrison v. Day, 106 S. E. 2d 636; James v. Almond, 170 Fed. Supp. 331; Cooper v. Aaron, 358 U. S. 1; Beck v. Orleans Parish School Board, 191 Fed Supp. 875.

affects on the basis of race or color the admission, enrollment or education of the infant plaintiffs, or any other Negro children similarly situated, to the high schools operated by the defendants in the County and to take immediate steps in this regard to the end that the applications be considered so as to permit the entrance of qualified persons into the white schools in the school term beginning September 1959. No decree was entered pursuant to the mandate of the Court of Appeals until the petitioners presented an appropriate order for entry therein on April 22, 1960, pertinent portions of said order being:

> "The defendants are restrained and enjoined from any action that regulates or affects on the basis of race or color the admission, enrollment or education of the infant plaintiffs, or any other Negro children similarly situated, to the high schools operated by the defendants in the County and that the defendants receive and consider the applications of such persons for admission to such high schools without regard to race or color.
>
> "That the defendants make plans for the admission of pupils in the elementary schools of the County without regard to race or color and to receive and consider applications to this and at the earliest practical day."

This Court and all counsel of record had knowledge of the fact that the public schools of Prince Edward County were closed prior to the entry of the said order.

The Board of Supervisors of Prince Edward County, anticipating the aforesaid decision of the Court of Appeals for the Fourth Circuit, refused to levy any taxes or appropriate any money for the maintenance of the public schools during the school year 1959-60, resulting in the closing thereof.

This action was in accord with the expressed policy of the Board of Supervisors (adopted in May 1956) to abandon public schools and educate the children in some other way if that be necessary to preserve separation of the races in the schools of Prince Edward County.[1]

All public schools in Prince Edward County have remained closed from that date to the present time and apparently will so remain until this or some state court directs that they be opened and maintained. Unfortunately, as a result thereof, all of the children of Prince Edward County, both white and colored, have been deprived of a public education since June 1959. In fact, none of the approximately 1800 colored children have received any formal education since that date. Nearly all of the 1500 white children have been attending private schools, operated by the Prince Edward School Foundation.

Under these circumstances should this Court enter an order directing the appropriate officials of Prince Edward County to reopen and maintain its public schools?

Section 129 of the Constitution of Virginia provides:

> "Free schools to be maintained.—The General Assembly shall establish and maintain an efficient system of public free schools throughout the State."

The Supreme Court of Appeals of Virginia, in Harrison v. Day, 106 S. E. 2d 636, held that Section 129 of the Virginia Constitution is still in the organic law (of Virginia) and must be complied with. The Court further stated in its opinion:

> "that Section 129 requires the state to maintain an efficient system of public free schools throughout the State. That means that the State must support such public free schools in the State as are necessary

[1] See plaintiffs' Exhibit #2.

> to an efficient system, including those in which the pupils of both races are compelled to be enrolled and taught together, however unfortunate that situation may be."

Therefore it would appear from this decision that the Supreme Court of Appeals of Virginia has determined that public schools must be maintained in Prince Edward County, Virginia.

However, the defendants earnestly contend that the public schools in Virginia are not now and never have been operated by the state or by any state agency; that they are now and always have been owned, operated, managed and controlled by local (that is, county or city) school boards. The defendants further contend that other sections of the Virginia Constitution and certain statutes made pursuant thereto must be considered and construed in order to determine this question.

Counsel for the plaintiffs contend it is not necessary for this Court or the Supreme Court of Appeals of Virginia to further construe and/or pass upon the validity of any actions of the Virginia Constitution or statutes made pursuant thereto in order to properly decide this issue. They contend the closing of the public schools in Prince Edward County, while maintaining public schools in every other city and county in the state, violates the Fourteenth Amendment to the Federal Constitution, and cite James v. Almond, 170 Fed. Supp. 331, in support thereof:

> "While the State of Virginia, directly or indirectly, maintains and operates a school system with the use of public funds, or participates by arrangement or otherwise, in the management of such a school system, no one public school or grade in Virginia may be closed to avoid the effect of the law of the land as interpreted by the Supreme Court,

> while the state permits other public schools or grades to remain open at the expense of the taxpayers. In so holding we have considered only the Constitution of the United States as it is unnecessary, in our opinion, to pass upon the specific provisions of the Constitution of Virginia which deals directly with the free public school system of the state. We do not suggest that, aside from the Constitution of Virginia, the state must maintain a public school system. That is a matter for state determination. We merely point out that the closing of a public school, or grade therein, for the reasons heretofore assigned violates the right of a citizen to equal protection of the laws and, as to any child willing to attend a school with a member or members of the opposite race, such a school-closing is a deprivation of due process of law."

Whether the State of Virginia or the County of Prince Edward, technically speaking, owns and operates the public schools is of no concern of the children who are being deprived of free public education. The question that must and should be judicially determined is: Can the public schools, heretofore maintained in Prince Edward County, be closed in order to avoid the racial discrimination prohibited by the Fourteenth Amendment?

Since the final answer to that question requires the interpretation of perhaps several sections of the Virginia Constitution and statutes adopted pursuant thereto, federal abstinence is the proper procedure.

> "This now well-established procedure is aimed at the avoidance of unnecessary interference by the federal courts with proper and validly administered state concerns, a course so essential to the balanced

working of our federal system. To minimize the possibility of such interference a scrupulous regard for the rightful independence of state governments should at all times actuate the federal courts, Matthews v. Rodgers, 284 U. S. 521, 525, as their contribution in furthering the harmonious relation between state and federal authority. Railroad Comm'r. v. Pullman Co., 312 U. S. 496." Harrison v. NAACP, 360 U. S. 167.

Counsel for all parties having indicated that an appropriate suit would be forthwith instituted in the Virginia state courts, this Court will defer its ruling on this question until the Supreme Court of Appeals of Virginia has rendered its decision, provided the said suit is filed within sixty days from this date.

Having thus disposed of the first question before the Court, and now turning to the second question, it is likewise necessary and proper to briefly review what has transpired in Prince Edward County subsequent to January 1, 1959. The record thus made is as follows:

The County Board of Supervisors of Prince Edward County, anticipating the May 5, 1959, decision of the Court of Appeals for the Fourth Circuit, failed or refused to make any funds available to the Prince Edward School Board for the fiscal and school years 1959-60, 1960-61 and 1961-62.

No public schools have been operated in the County since June 1959.

On May 16, 1959, certain private citizens obtained a charter for the Prince Edward School Foundation in order that private schools would be available for white children.

Such private schools were conducted during the school year 1959-60 for white children only; no tuition was charged; these schools were supported by private contributions.

Memorandum Opinion, Dated August 23, 1961

For the school year 1960-61, the Prince Edward School Foundation charged a tuition of $240.00 for its elementary students and $265.00 for its high school students.

On July 18, 1960, the Board of Supervisors of Prince Edward County adopted an ordinance providing for $100.00 grants in aid of the education of any Prince Edward County child whose parent or guardian applied therefor, who attended or proposed to attend a school that met the requirements of the ordinance.[1]

The Board of Supervisors adopted, on the same date, an ordinance providing for a tax credit, not to exceed 25% of the total county real and personal property taxes for contributions made to private non-profit nonsectarian schools located within Prince Edward County.[2]

During the school year 1960-61, thirteen hundred twenty-seven white students enrolled in the schools being operated by the Prince Edward School Foundation, obtained state and county tuition grants, totaling $225.00 for each elementary student and $250.00 for each high school student.

During the school year 1960-61, the Prince Edward School Foundation received private contributions in the amount of $200,000.00 which were credited to its building fund, its library fund and its operating fund.

The Treasurer of Prince Edward County credited as payments on account of county tax bills the sum of approximately $56,000.00, all of which was contributed to the Prince Edward School Foundation.

During both the 1959-60 and 1960-61 school years practically all of the white school teachers who formerly taught in the public school system in Prince Edward County were employed as teachers by the Prince Edward School Foundation.

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[1] See plaintiffs' Exhibit #15.

[2] See plaintiffs' Exhibit #16.

During the 1960-61 school year the Prince Edward School Foundation schools were accredited by the State Board of Education.

In 1960-61, the sum of $39,360.00 was received by Prince Edward County, from the State of Virginia as its share of the State Constitutional School Fund. These so-called constitutional funds were neither requested nor received by Prince Edward County during the school year 1959-60. This money was used by the School Board for the payment of debt service charges, repairs and upkeep of school buildings and grounds, fire insurance and other fixed charges and administration costs.

Five Negro children residing in Prince Edward County applied for and received state and county tuition grants for attending public schools elsewhere in Virginia.

The Prince Edward County Christian Association, a Negro association, conducted training centers for Negro children beginning in the late fall of 1959. These centers do not meet the requirements for either state or county tuition grants.

Approximately one-third of the Negro school children of Prince Edward County attended these training centers. The other Negro school children of Prince Edward County have not received any schooling or training of any kind since the closing of the public schools.

By the adoption of these County ordinances, and the payment of the state tuition grants during the time the schools of Prince Edward County were closed, have any of the defendants circumvented or attempted to circumvent or frustrate the anticipated order of this Court, entered pursuant to the mandate of the Court of Appeals?

We think they have.

> "The basic decision in Brown v. Board of Education was unanimously reached by the Supreme Court of the United States. Since the first Brown

opinion three new Justices have come to the court. They are at one with the Justices still on the court, who participated in that basic decision, as to its correctness and that decision is now unanimously reaffirmed." • • •

"The principles announced in that decision and the obedience of the state to them, according to the command of the Constitution are indispensable for the protection of the freedoms guaranteed by our fundamental charter for all of us." Cooper v. Aaron, 358 U. S. 1.

"In short, the constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this Court in the Brown case can neither be nullified openly and directly by state legislators or state executives or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted 'ingeniously or ingenuously.' (Smith v. Texas, 311 U. S. 128, 132.)" Cooper v. Aaron, 358 U. S. 1.

Without questioning the purpose or motives of the members of the Board of Supervisors of Prince Edward County, the end result of every action taken by that body was designed to preserve separation of the races in the schools of Prince Edward County.

"When a State[1] exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right. This principle has had many applications. It has long been recognized in cases which have prohibited

[1] Prince Edward County is likewise limited by this rule of law.

> a State from exploiting a power acknowledged to be absolute in an insulated context to justify the imposition of an 'unconstitutional condition.' What the Court has said in those cases is equally applicable here, viz., that 'Acts generally lawful may become unlawful when done to accomplish an unlawful end, (United States v. Reading Co., 226 U. S. 324, 357.)'' Gomillion v. Lightfoot, 364 U. S. 339.

Approximately $132,000.00 from general tax funds were paid to those residents of Prince Edward County who sent their children to schools maintained by the Prince Edward School Foundation, (a segregated white school). An additional $56,000.00 of tax revenue, in the form of tax credits, was used for this purpose. Like aid was not available to the colored residents of Prince Edward County, for the obvious reason there was no private colored school in existence. By closing the public schools, the Board of Supervisors have effectively deprived the citizens of Prince Edward County with a freedom of choice between public and private education. County tax funds have been appropriated (in the guise of tuition grants and tax credits) to aid segregated schooling in Prince Edward County.

That, to say the least, is circumventing a constitutionally protected right.

We do not hold these County ordinances[1] are facially unlawful. We only hold they become unlawful when used to accomplish an unlawful end, (the perpetuation of segregated schooling in Prince Edward County).

Therefore an order will be entered herein restraining and enjoining the members of the Board of Supervisors of Prince Edward County, the County Treasurer and their respective agents and employees from approving and paying out any county funds purportedly authorized by the

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[1] Educational grant in aid ordinance adopted July 18, 1960; Tax credit ordinance adopted July 18, 1960.

so-called "grant in aid" ordinance, adopted July 18, 1960, and from allowing any tax credits purportedly authorized by the so-called "tax credit" ordinance, adopted July 18, 1960, during such time the public schools of Prince Edward County remain closed.

We are next confronted with the question of the lawfulness of the payment of state tuition grants to residents of Prince Edward County during the time public schools are closed.

The policy of the Commonwealth of Virginia as enunciated in Section 22-115.29 of the Code of Virginia, is as follows:

> "The General Assembly, mindful of the need for a literate and informed citizenry, and being desirous of advancing the cause of education generally, hereby declares that it is the policy of this Commonwealth to encourage the education of all of the children of Virginia. In furtherance of this objective, and to afford each individual freedom in choosing public or private schooling, the General Assembly finds that it is desirable and in the public interest that scholarships should be provided from the public funds of the State for the education of the children in nonsectarian private schools in or outside, and in public schools located outside, the locality where the children reside; and that counties, cities and towns, if the town be a separate school district approved for operation, should be authorized to levy taxes and appropriate public funds to provide for such scholarships. (1960, c. 448.)"

Thus a "freedom of choice" between public and private schooling is clearly contemplated.

That the state did not intend its "scholarships" would be available in communities without public schools is best

evidenced by reference to the regulation of the State Board of Education governing public scholarships.[1] This rule reads as follows:

> "Scholarships will be available for pupils of legal school age who are eligible to attend the public schools in the county, city or town in which the parent, guardian or such other person standing in loco parentes is a bona fide resident."

This rule is plain and unequivocal. State scholarships are not available to persons residing in counties that have abandoned public schools.

An order will therefore be entered restraining and enjoining the County Superintendent of Prince Edward County, the Superintendent of Public Instruction, their agents and employees, and all persons working in concert with them, from receiving, processing or approving any applications for state scholarship grants from persons residing in Prince Edward County so long as the public schools of Prince Edward County remain closed.

The order of April 20, 1960, provides, among other things:

> "That the defendants (County Superintendent and School Board) make plans for the admission of pupils in the elementary schools of the County without regard to race or color and to receive and consider applications to this and at the earliest practical day."

That no such plans have been made is admitted. The defendants justify their failure to comply with the plain language of this order by stating they acted on advice of counsel and that it appeared useless to make such plans so long as the public schools of the County were closed.

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[1] See plaintiffs' Exhibit #20.

This Court cannot accept these reasons as justification for failing to comply with this portion of the order. Therefore the defendants are herewith directed to forthwith proceed with the preparation of such plans, so that they may be readily available when and if the public schools of Prince Edward County are reopened. The defendants should advise the Court in writing of the progress made on or before November 15, 1961.

There is no evidence the School Board of Prince Edward County has leased or transferred or intends to lease or transfer any school property. The prayer for injunctive relief is therefore denied.

Counsel for the plaintiffs should prepare an appropriate order in accordance with this opinion, and submit the same to counsel for defendants for approval, and it will be entered accordingly, effective this date. Costs will be assessed against the defendants.

/s/ OREN R. LEWIS,
United States District Judge.

Alexandria, Virginia
August 23, 1961

Order, Filed November 16, 1961

This cause came on again to be heard upon the amended supplemental complaint, the motions to dismiss and answers of the defendants, upon the evidence and exhibits heard ore tenus by the Court, upon written briefs and argument of counsel, upon a consideration of all of which the Court rendered its memorandum opinion dated August 23, 1961, the original of which has heretofore been filed as a part of the record in this case; and

It appearing from statement of counsel and the copy of the suit papers that an appropriate suit has been timely instituted in the Supreme Court of Appeals of Virginia, seeking a determination of the legal question posed in this Court's opinion of August 23, 1961, namely: "Can the public schools, heretofore maintained in Prince Edward County, be closed in order to avoid the racial discrimination prohibited by the 14th Amendment?"

The Court reserves further consideration of this question until there has been a final determination by the Supreme Court of Appeals of Virginia of the pertinent provisions of the United States Constitution, the Virginia Constitution and statutes adopted pursuant thereto; and

The Court being of the opinion that action taken pursuant to certain ordinances of Prince Edward County would be a circumvention or attempted circumvention of the order of this Court entered April 22, 1960; it is

ORDERED that the Board of Supervisors of Prince Edward County, the County Treasurer of Prince Edward County and their respective agents and employees are hereby restrained and enjoined from approving and paying out any county funds purportedly authorized by the so-called "grant in aid" ordinance adopted July 18, 1960, and from allowing any tax credits purportedly authorized by the so-called "tax credit" ordinance adopted July 18, 1960, during such time as the public schools of Prince Edward County remain closed; said restraining order to remain in ef-

fect from August 23, 1961, until twenty days after the date of the final decision of the Supreme Court of Appeals of Virginia in the above mentioned suit, upon which date it shall stand dissolved except upon further order of this Court; and

The Court having found that scholarships awarded pursuant to Section 22-115.29 et seq. of the Code of Virginia (1950), as amended, are not available to persons residing in counties that have abandoned public schools; it is

ORDERED that the Division Superintendent of Schools of Prince Edward County, the Superintendent of Public Instruction, their agents, employees and all persons working in concert with them, are hereby restrained and enjoined from processing or approving any applications for State scholarship grants from persons residing in Prince Edward County so long as the public schools of Prince Edward County remain closed; said restraining order to remain in effect from August 23, 1961, until twenty days after the date of the final decision of the Supreme Court of Appeals of Virginia in the above mentioned suit, upon which date it shall stand dissolved except upon further order of this Court;

It is further ORDERED that the School Board of Prince Edward County forthwith comply with that portion of the order of this Court entered April 22, 1960, that provides, among other things, for making plans for the admission of pupils in the elementary schools of Prince Edward County without regard to race or color, and make written report to this Court on or before November 16, 1961, of the progress being made in the preparation of such plans; and

There being no evidence that the School Board of Prince Edward County has leased or transferred or intends to lease or transfer any school property, the plaintiff's prayer for injunctive relief is denied.

Order, Filed November 16, 1961

The Court herewith reserves decision upon all other issues raised in the amended supplemental complaint and the motions and answers of the various defendants not specifically herein ruled upon until twenty days after the date of the final decision of the Supreme Court of Appeals of Virginia in the above mentioned suit; and

This cause is continued.

The Clerk shall forthwith serve an attested copy of this order, by certified or registered mail, upon the individual members of the School Board of Prince Edward County, the Division Superintendent of Schools of Prince Edward County, the Superintendent of Public Instruction, the individual members of the Board of Supervisors of Prince Edward County, the Treasurer of Prince Edward County, and all counsel of record in this suit.

s/ OREN R. LEWIS
United States District Judge

Richmond, Virginia
November 16, 1961

Order, Entered May 24, 1962

Defendant, School Board of Prince Edward County, Virginia, having moved in open court for an order pursuant to Rule 56 granting summary judgment in its favor upon Section V (paragraph 16) of the Amended Supplemental Complaint and dismissal of said section; and the Court in its memorandum opinion of August 23, 1961, and in its order of November 16, 1961, having found that there is no evidence that the School Board of Prince Edward County has leased or transferred or intends to lease or transfer any school property and in said last mentioned order having denied the plaintiffs' prayer for injunctive relief in connection therewith; and the Court being of opinion that there is no just reason for delay in finally disposing of the claim raised by Section V of the Amended Supplemental Complaint and that pursuant to Rule 54(b) it should now expressly direct entry of judgment in favor of this defendant, School Board of Prince Edward County, upon said claim;

IT IS ORDERED

That defendant's motion for a summary judgment as to the cause of action alleged in Section V of the Amended Supplemental Complaint is hereby granted and said Section V is hereby dismissed and the Clerk of this Court is directed to enter a final judgment in favor of said School Board on the cause of action alleged in said Section V of the Amended Supplemental Complaint, and the undersigned District Judge expressly determines that there is no just reason for delay in the entry of final judgment on this order.

s/ OREN R. LEWIS
United States District Judge

May 24, 1962

Memorandum Opinion, Dated July 25, 1962

The infant plaintiffs in the Prince Edward school case are again before this Court seeking admission to the public schools of Prince Edward County, Virginia, on a non-discriminatory basis—all in accord with the *Brown*[1] decisions.

Rather than comply with those decisions and the order of this Court, the defendant Board of Supervisors caused the closing of all public schools in the county.

Thereafter the petitioners filed an amended supplemental complaint raising the following issues:

(1) Whether the public schools heretofore maintained in Prince Edward County can be closed in order to avoid the racial discrimination prohibited by the Fourteenth Amendment of the United States Constitution.

(2) Whether the defendants, individually or in concert, have deliberately circumvented, or attempted to circumvent or frustrate, the order of this Court entered herein on the 22nd day of April, 1960.

Issue numbered (2) was partially determined August 23, 1961, and it is not necessary to repeat those rulings in this opinion (see memorandum opinion dated August 23, 1961, and order dated November 1, 1961).

This Court has repeatedly stated that the Prince Edward school case would not be terminated until this or some other court determined issue numbered (1), above recited.

Upon the assurance of counsel for petitioners that such a suit would be filed in the state courts, and upon the further assurance of counsel for the Board of Supervisors

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[1] *Brown* v. *Board of Education*, 347 U. S. 483 (1954); 349 U. S. 294 (1955).

of Prince Edward County that he would file such a suit[2] if the petitioners failed to so do, this Court abstained from determining the issue, pending a final ruling by the Supreme Court of Appeals of Virginia.

But such was not to be—true the petitioners filed a petition for writ of mandamus in the Supreme Court of Appeals[3] to compel the Board of Supervisors of Prince Edward to appropriate money for the maintenance and operation of free public schools in the county. However, they expressly informed that court in their printed brief that "There are no Federal questions (involved) in this proceeding," and Chief Justice Eggleston, speaking for the Supreme Court of Appeals, said " • • • and we perceive none."

The defendants now move this Court to dismiss or, in the alternative, to abstain from determining the issues presented in the amended supplemental bill of complaint upon the ground the petitioners deliberately failed and refused to comply with the order[4] of this Court by deleting all federal questions from the suit filed in the Supreme Court of Appeals.

This motion would be meritorious had the defendants filed an appropriate answer and/or countersuit to the plaintiffs' petition for writ of mandamus so that the citizens of Virginia would have learned from their highest state court whether the public schools of Prince Edward County could be legally closed in accordance with the State and Federal Constitutions, under the circumstances and conditions there existing.

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[2] This assurance was made after conferring with the Attorney General of Virginia and counsel for the School Board of Prince Edward County.

[3] *Leslie Francis Griffin, Jr.* v. *Board of Supervisors of Prince Edward County*, 203 Va. 321, 124 S. E. 2d 227 (1962).

[4] Order of November 1, 1961.

This "issue" must be determined—and dismissal of the pending suit will not accomplish that end. Therefore, the motion of the defendants to dismiss the amended supplemental complaint will be denied.

The doctrine of abstention is well embedded in the federal procedure, and rightfully so. It is aimed at the avoidance of unnecessary interference by the federal courts with properly administered state concern. See *Harrison* v. *N.A.A.C.P.*, 360 U. S. 167 (1959). However, the District Court cannot avoid its duty to adjudicate a controversy properly before it by postponing the exercise of its jurisdiction by invoking the doctrine of abstention. See *County of Allegheny* v. *Frank Mashuda Company*, 360 U. S. 185 (1959). And especially so when it is advised by counsel for all parties that none of them intends to file another suit in the state courts.[5]

The Prince Edward County public schools have been closed for three years and will remain closed unless they be legally required to reopen. During the interim practically all of the negro children in the county have been denied a formal education. The white children are being educated in the (private) Prince Edward Foundation schools, or away from home, at the expense of their parents and friends. All other children in the State of Virginia, both negro and white, are given the privilege of being educated in public schools at public expense.

This is a suit in equity instituted by the infant plaintiffs requesting this Court to declare and insure them, and all others similarly situated, their constitutional rights.

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[5] Counsel for petitioners contend state constitutional questions are not involved—they seek only federal relief. The Attorney General and counsel for the Board of Supervisors and the School Board of Prince Edward admit both State and Federal constitutional questions are involved but contend they have neither the authority not the duty to file an appropriate suit in the state courts.

To further abstain is to further delay—and further delay in the formal education of 1,700 children would create an irreparable loss. These children are entitled to know whether any of their federally protected rights are being abridged. The motion to further abstain will be denied.

That the Board of Supervisors of Prince Edward caused the closing of the public schools in the county in order to avoid the racial discrimination prohibited by the Supreme Court of the United States[6] cannot be seriously questioned. This action was in accord with the Board's expressed policy (adopted in May, 1956) to abandon public schools and educate the children some other way if that be necessary to preserve segregation of the races in the schools of Prince Edward County.[7]

The defendants attempt to justify their action and/or inaction upon the theory that public schools of Prince Edward County are owned, operated, managed and controlled by the local school board—that they are not now and never have been operated by the state or any state agency—that the Fourteenth Amendment is addressed solely to the state—that the Board of Supervisors cannot be compelled to levy taxes or appropriate money for the maintenance of free public schools—and that the reason or motive back of such action or inaction is beyond judicial review.

In determining whether these contentions are well-founded, it is necessary and proper to review and re-examine the Federal and State Constitutions, the implementing statutes, and the recent court decisions pertaining to public education. In so doing, we find the Supreme Court of Appeals of Virginia in the *Griffin* suit, *supra*, held that Section 136 of the Constitution of Virginia and Code Sections 22-126 and 22-127, as amended, which implement the con-

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[6] *Brown* v. *Board of Education*, *supra*.

[7] See Petitioners' Exhibit No. 2.

stitutional provision, vest in the Board of Supervisors of Prince Edward County the discretionary power and authority to determine what additional sums, if any, should be raised by local taxation to supplement the funds provided by the state for the support of the schools in the county. That holding was in accord with previous decisions of that court. See *School Board of Carroll County* v. *Shockley*, 160 Va. 405, 168 S. E. 419 (1933). See also *Almond* v. *Gilmer*, 188 Va. 1, 49 S. E. 2d 431 (1948); *Scott County School Board* v. *Board of Supervisors*, 169 Va. 213, 193 S. E. 52 (1937); *Board of Supervisors of Chesterfield County* v. *County School Board*, 182 Va. 266, 28 S. E. 2d 698 (1944).

There is not anything in the *Griffin* decision indicating that the Board of Supervisors has a duty to maintain or operate public schools. To the contrary, Chief Justice Eggleston, speaking for the court, said:

> "Whatever may be the duty imposed under Section 129 of the Constitution, that section is plainly directed to the General Assembly and not to the local governing bodies. It says, 'The General Assembly shall establish and maintain an efficient system of public free schools throughout the State' * * * *"

In *Harrison* v. *Day*, 200 Va. 439, 106 S. E. 2d 636 (1959), the Supreme Court of Appeals held that Section 129 of the Virginia Constitution is still in the organic law (of Virginia) and must be complied with. The court further stated in its opinion that Section 129

> "* * * requires the State to '*maintain* an efficient system of public free schools *throughout the State*.' (Emphasis included.) That means that the State must support such public free schools in the State as are necessary to an efficient system, including those in which the pupils of both races are compelled to

be enrolled and taught together, however unfortunate that situation may be."

The court further stated that the provisions of certain appropriation acts (then under consideration by that court) violated Section 129 of the Constitution in that they removed from the public school system any schools in which pupils of the two races are mixed and made no provision for the support and maintenance of said schools as a part of the system.

From this decision is would appear that the Constitution of Virginia imposes a mandatory duty to establish and maintain an efficient system of public schools throughout the state, and that the state may not remove from the system schools in which the races are mixed.

Article IX of the Constitution of Virginia, embracing the subjects of Education and Public Instruction, contemplates that moneys for the establishment and maintenance of public free schools will be appropriated partly by the General Assembly and partly by the local governing units. (See *Griffin* v. *Board of Supervisors of Prince Edward County, supra.*) Other sections of that article provide for the appointment and duties of the Superintendent of Public Instruction, the powers and duties of the State Board of Education, and the creation of school districts and school trustees. Title 22 (Education) of the Code of Virginia, implements these constitutional provisions.

From a careful reading of the foregoing Virginia authorities, it would appear the local school boards have been given the responsibility by law of establishing, maintaining, and operating the school system along with the State Board of Education, Superintendent of Public Instruction and Division Superintendent of Schools. The Supreme Court of Appeals has so held.[8]

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[8] See *Board of Supervisors of Chesterfield County, et al.* v. *County School Board of Chesterfield County, supra.*

Thus it is clear the public schools of Prince Edward County are not under the sole control of the county.

This Court finds, and so holds, that the public schools of Virginia were established, and are being maintained, supported and administered in accordance with state law. These public schools are primarily administered on a statewide basis. A large percentage of the school operating funds is received from the state. The curriculums, school text books, minimum teachers' salaries, and many other school procedures are governed by state law.

Nevertheless the public schools of Prince Edward County have been closed for the past three years. This was accomplished by the refusal of the Board of Supervisors to levy taxes or appropriate money for the maintenance of public schools, all of which was in accord with the expressed policy of the Board of Supervisors in their attempt to avoid the requirements of the *Brown* decision. This action was taken with full knowledge and acquiescence of the State Board of Education, the Superintendent of Public Instruction, the School Board of Prince Edward County, and the Division Superintendent.

In these circumstances true focus is not on the Board of Supervisors but on the above-named school officials, all of whom directly or indirectly are state officials. They cannot abdicate their responsibilities either by ignoring them or by merely failing to discharge them, whatever the motive may be. See *Burton* v. *Wilmington Pkg. Authority*, 365 U. S. 715 (1961).

As the court said in *Bush* v. *Orleans Parish School Board*, 190 F. Supp. 861 (1960),

> "* * * equality of opportunity to education through access to non-segregated public schools is a right secured by the Constitution of the United States to all citizens regardless of race or color

against State interference. *Brown* v. *Board of Education*, 347 U. S. 483. * * * accordingly, every citizen of the United States, by virtue of his citizenship, is bound to respect this constitutional right, and * * * all officers of the state, more especially those who have taken an oath to uphold the Constitution of the United States, including the governor, the members of the state legislature, judges of the state courts, and members of the local school boards, are under constitutional mandate to take affirmative action to accord the benefit of this right to all those within their jurisdiction. U. S. Const. art. VI, cls. 2, 3; *Cooper* v. *Aaron*, 358 U. S. 1."

And as the court said in *Cooper* v. *Aaron* 358 U. S. 1 (1958),

"'Whoever, by virtue of public position under a State government, * * * denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning.' *Ex parte Virginia*, 100 U. S. 339, 347. Thus the prohibitions of the Fourteenth Amendment extend to all action of the State denying equal protection of the laws; whatever the agency of the State taking the action, see *Virginia* v. *Rives*, 100 U. S. 313; *Pennsylvania* v. *Board of Directors of City Trusts of Philadelphia*, 353 U. S. 230; *Shelley* v. *Kraemer*, 334 U. S. 1; or whatever the guise in which it is taken, see *Derrington* v. *Plummer*, 240 F. 2d 922; *Department of Conservation and Development* v. *Tate*, 231 F. 2d 615."

Note also the following apt statement from *Cooper* v. *Aaron:*

> "It is, of course, quite true that the responsibility for public education is primarily the concern of the States, but it is equally true that such responsibilities, like all other state activity, must be exercised consistently with federal constitutional requirements as they apply to state action. The Constitution created a government dedicated to equal justice under law. The Fourteenth Amendment embodied and emphasized that ideal. State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws. The right of a student not to be segregated on racial grounds in schools so maintained is indeed so fundamental and pervasive that it is embraced in the concept of due process of law." See also *James* v. *Almond, supra.*

Counsel for the Board of Supervisors has seriously contended, however, that what the Board of Supervisors does, or does not do, is not state action; that the Board of Supervisors cannot be compelled to levy taxes or appropriate money for school purposes. The Supreme Court of Appeals in the recent *Griffin* case so held in re levying taxes and appropriating money for school purposes. That court did not, however, pass upon or consider any federal questions.

Counsel for the Prince Edward School Board and the Division Superintendent wholeheartedly supported the contention of the Board of Supervisors. No argument was tendered justifying the failure of those school officials in fulfilling or attempting to fulfill the responsibility imposed by law of establishing, maintaining, and operating a free

public school system, except to state that the County School Board will establish and maintain public schools in Prince Edward County if funds are made available to it, all in strict accordance with the April 22, 1960 order of this Court.

The Attorney General of Virginia, counsel for the State Board of Education and Superintendent of Public Instruction, likewise, in the main, supported the position of the Board of Supervisors. No argument was presented justifying the failure of those state officials from attempting to fulfill the responsibilities reposed in them by the Constitution of Virginia of establishing a system of free public schools throughout the state, and as set forth in *Board of Supervisors of Chesterfield County* v. *County School Board of Chesterfield County, supra.*

The contention that the action and inaction of the foregoing state and county officials resulting in the closing of the Prince Edward County schools was a local action, beyond the purview of the Fourteenth Amendment, is not well taken. County has been defined[9] "as a body politic, or political subdivision of the State, created by the legislature for administrative and other public purposes." It is generally regarded as merely an agency or arm of the state government.

The United States Constitution recognizes no governing units except the federal government and the states. A contrary position would allow a state to evade its constitutional responsibilities by carve-outs of small units. At least in the area of constitutional rights, specifically with respect to education, a state can no more delegate to its subdivisions the power to discriminate than it can itself directly establish inequalities. "When a parish wants to lock its school doors, the state must turn the key. If the

[9] Corpus Juris Secundum, V. 20, p. 1300.

rule were otherwise, the great guarantee of the equal protection clause would be meaningless."[10]

James v. *Almond*, 170 F. Supp. 331 (1959), in discussing the validity of the closing of some of the City of Norfolk schools, also announces this same view. It said:

> "While the State of Virginia, directly or indirectly, maintains and operates a school system with the use of public funds, or participates by arrangement or otherwise in the management of such a school system, no one public school or grade in Virginia may be closed to avoid the effect of the law of the land as interpreted by the Supreme Court, while the state permits other public schools or grades to remain open at the expense of the taxpayers."

The Court further said:

> "We do not suggest that, aside from the Constitution of Virginia, the state must maintain a public school system. That is a matter for state determination."

This Court holds that the public schools of the Prince Edward County may not be closed to avoid the effect of the law of the land as interpreted by the Supreme Court, while the Commonwealth of Virginia permits other public schools to remain open at the expense of the taxpayers.

In the event the public schools of Prince Edward County are reopened and maintained in accordance with the order of this Court entered herein on the 22nd day of April, 1960, it will not be necessary to enter a more formal order. If, however, the said schools are not reopened prior to Sep-

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[10] *Hall* v. *St. Helena Parish School Board*, 197 F. Supp. 649 (1961).

tember 7, 1962, this Court will on that day consider any and all proposed orders tendered by counsel of record.

> "* * * When, notwithstanding their oath so to do, the officers of the state fail to obey the Constitution's command, it is the duty of the courts of the United States to secure the enjoyment of this right to all who are deprived of it by action of the state. *Brown* v. *Board of Education*, 349 U. S. 294." *Bush* v. *Orleans Parish School Board, supra.*

The School Board of Prince Edward County is herewith directed to complete plans for the admission of pupils in the elementary and high schools of the county without regard to race or color and to receive and consider applications to this end at the earliest practical date. The proposed plans should be submitted to all counsel of record not later than September 1, 1962, if possible, and to this Court on September 7, 1962.

The motion to substitute successor defendants is herewith granted.

The motion to dismiss the motion for further relief is herewith granted.

The motion to dismiss the injunction entered herein on November 16, 1961, and further extended March 26, 1962, is denied. The said injunction is effective only so long as the public schools of Prince Edward County remain closed.

Let copies of this memorandum be mailed forthwith to all counsel of record.

/s/ OREN R. LEWIS,
United States District Judge.

Alexandria, Virginia
July 25, 1962

Memorandum Opinion, Filed October 10, 1962

Counsel for the defendants having expressed their desire to be heard prior to the entry of the Court's suggested order (mailed to all counsel of record September 20), the Court again heard the matter informally in Chambers on the 3rd day of October, 1962, at which time counsel for the defendants moved the Court to amend its finding as set forth in its Memorandum Opinion of July 25, 1962, and to rehear and reconsider in part that opinion, and to abstain upon the grounds set forth in said motion.

Upon consideration of which, together with the argument of counsel, the Court is of the opinion that said motion ought to be DENIED in its entirety, and it is so ORDERED.

Whereupon counsel for the defendants then orally moved the Court to amend some of the findings set forth in the Memorandum Opinion of July 25, 1962, upon consideration of which the Court herewith amends paragraph 2, page 3, of said Memorandum Opinion by inserting the word "reply" after the word "printed" (line 7), and amends paragraph 2, page 11, by deleting "and acquiescence" (line 9) therefrom. All other requested amendments or deletions are herewith DENIED.

Whereupon counsel for the defendants then made certain suggestions in re the proposed order as prepared by the Court to be entered herein, some of which were adopted and some of which were refused, and the proposed order, as prepared by the Court in accord with its Memorandum Opinion of July 25, was this day entered herein.

s/ OREN R. LEWIS
United States District Judge

Alexandria, Virginia
October 10, 1962

Order, Filed October 10, 1962

Upon consideration of the evidence, exhibits and authorities cited in support of the contentions of the respective parties, and argument in re all motions pending in the above-styled matter, the Court rendered its Memorandum Opinion dated July 25, 1962, wherein, it was provided among other things:

> "In the event the public schools of Prince Edward County are reopened and maintained in accordance with the order of this Court entered herein on the 22nd day of April, 1960, it will not be necessary to enter a more formal order. If, however, the said schools are not reopened prior to September 7, 1962, this Court will on that day consider any and all proposed orders tendered by counsel of record."

Upon which date, counsel for the defendants moved the Court to stay further proceedings herein until 20 days after date of final disposition in the Supreme Court of Appeals of Virginia of the suit which was instituted in the Circuit Court of the City of Richmond on August 31, 1962, by the School Board of Prince Edward County, et al v. Leslie Francis Griffin Sr., et al, to determine among other things whether the public schools heretofore maintained in Prince Edward County can be closed in order to avoid the racial discrimination prohibited by the Fourteenth Amendment;

To which motion counsel for the plaintiffs objected; and

It appearing to the Court that further abstention would create an irreparable loss in the formal education of the children of Prince Edward County,

The motion of the defendants to stay further proceedings in this suit is DENIED.

Pursuant to the order of July 25, 1962, and previous orders of this Court that the School Board of Prince Ed-

ward County complete plans for the admission of pupils in the elementary and high schools of the county without regard to race or color and to receive and consider applications to this end at the earliest practical date, the said School Board filed a report stating that it no longer is possessed of the power to enroll or place pupils or to determine the school to which any children shall be admitted; that such power is vested in the Pupil Placement Board; and accordingly, the plan proposed for the admission of pupils (to Prince Edward County public schools) is that set forth in the Pupil Placement Law and the rules and regulations of the Board.

The report thus received does not comply with the orders of this Court.

The authority having the immediate supervision of the schools, that is, the agency actually receiving or rejecting the pupils, is the County School Board. The Placement Act, however, is still alive as between the School Board and the Placement Board. It divests the former of and invests the latter with all assignment powers; hence, the School Board must submit these applications to the Placement Board and in the first instance bow to the latter's assignment prerogative, but in any order of revision on a review will bear directly upon the School Board as the body ultimately responsible and immediately answerable to the Court for the physical enrollment and admissions of all pupils.

Accordingly, if the School Board of Prince Edward County intends to rely upon the validity of the Pupil Placement Board assignment plan, such plan, set forth in reasonable detail, should be forthwith submitted to this Court for review and approval, and it is so Ordered.

It appearing to the Court that the public schools of Prince Edward County were not reopened prior to September 7, 1962, in accordance with the Court's Memorandum Opinion of July 25, 1962, and that counsel of record could

not agree on the wording of an appropriate order to be entered in accordance therewith;

The Court's Memorandum Opinion of July 25, 1962, is incorporated herein and made a part of this order by reference; and

The Court having found:

that the Board of Supervisors of Prince Edward County caused the closing of the public schools in the county in order to avoid the racial discrimination prohibited by the Supreme Court of the United States; and

that said schools have been closed for three years and will remain closed unless they be legally required to reopen; and

that during the interim practically all of the negro children have been denied a formal education; and that the white children have been educated in private schools or away from home at the expense of their parents and friends; and

that all other children in the State of Virginia, both negro and white, are granted the privilege of being educated in public schools at public expense; and

that Section 129 of the Constitution of Virginia, as construed by the Supreme Court of Appeals of Virginia, requires the State to maintain an efficient system of public free schools throughout the State; and

that Article 9 of the Constitution of Virginia contemplates that money for the establishment and maintenance of public free schools will be appropriated partly by the General Assembly and partly by the local governing units; and

that the State Board of Education, Superintendent of Public Instruction and Division Superintendent of Schools, and the local school boards, have been given the responsibility by law of establishing, maintaining and operating the school system; and

that the public schools of Virginia were established and are being maintained, supported and administered in accordance with State law—primarily on a state-wide basis; and

that a large percentage of the school operating funds is received from the State; and

that textbooks, curriculums, minimum teachers' salaries and many other school procedures are governed by State law; and

that the aforementioned school officials, all of whom are directly or indirectly State officials, cannot abdicate their responsibilities merely by ignoring them or by failing to discharge them, whatever the motive may be;

And the Court having concluded that the closing of the public schools in Prince Edward County, under the circumstances and conditions there existing, is prohibited by the Fourteenth Amendment of the Constitution of the United States; it is

ADJUDGED, ORDERED AND DECREED that the public schools of Prince Edward County may not be closed to avoid the effect of the law of the land as interpreted by the Supreme Court while the Commonwealth of Virginia permits other public schools to remain open at the expense of the taxpayers; and it is further

Order, Filed October 10, 1962

ORDERED AND DECREED as follows:

(1) That the defendants' motion to dismiss, or in the alternative to abstain from determining the issues presented in the amended supplemental complaint, is Denied.

(2) That the defendants' motion to dismiss the plaintiffs' motion for further relief is Granted.

(3) That the plaintiffs' motion to substitute successor defendants is Granted, and Anne Dobie Peebles and C. Stuart Wheatley, Jr., individually and as members of the State Board of Education, are substituted for Gladys V. V. Morton and William J. Story as parties defendant herein.

(4) That the defendants' motion to dissolve the injunction entered herein on November 16, 1961 and further extended on March 26, 1962, is Denied. Said injunction is herewith extended so long as the public schools of Prince Edward County remain closed.

This Court will defer the entry of such further orders as may be necessary and proper to require full compliance with this decree pending review by the United States Court of Appeals for the Fourth Circuit and the Supreme Court of the United States, providing such appeal is noted and perfected within the time provided by law.

s/ OREN R. LEWIS,
United States District Judge.

Alexandria, Virginia
October 10, 1962

Notice of Appeal

Notice is hereby given that Cocheyse J. Griffin, Mignon D. Griffin, Naja D. Griffin and L. Francis Griffin, Jr., infants, by and through L. Francis Griffin, Sr., their father and next friend, Osa Sue Allen and Ada D. Allen, infants, by and through Hal Edward Allen, their father and next friend, Toby Hicks, Carl Hicks, Gregory Hicks, Boyce U. Z. Hicks and John Hicks, infants, by and through C. W. Hicks, their father and next friend, Betty Jean Carter, an infant, by and through James L. Carter, her father and next friend, Dorothy Mae Wood, an infant, by and through Spencer Wood, Jr., her father and next friend, Jacquelyn Reid, an infant, by and through Warren A. Reid, her father and next friend, and L. Francis Griffin, Sr., Hal Edward Allen, C. W. Hicks, James L. Carter, Spencer Wood, Jr., and Warren A. Reid

Hereby appeal to the United States Court of Appeals for the Fourth Circuit from so much of the order of this Court entered in the above captioned cause on October 10, 1962, as defers, pending review, the entry of an order directing compliance with the Court's holding that the public schools of Prince Edward County may not be closed to avoid the effect of the law of the land while the Commonwealth of Virginia permits other public schools to remain open at the expense of the taxpayers; the effect of such deferment being a refusal of the prayer of the amended supplemental complaint that the defendants be enjoined and restrained from refusing to maintain and operate an efficient system of public free schools in Prince Edward County, Virginia, and a refusal of the prayer for general relief.

The said appellants have heretofore given notice, and they hereby again give notice, of their appeal to the United States Court of Appeals for the Fourth Circuit from the

order of this Court entered in the above captioned action on November 16, 1961, and from so much of said order as limits the effective period of its restraining or injunctive provisions to so long as the public schools of Prince Edward County remain closed, the effect of said order and of its said limitation being a refusal of the prayers of the plaintiffs' amended supplemental complaint that the defendants be enjoined and restrained:

(b) From expending public funds for the direct or indirect support of any private school which, for reason of race, excludes the infant plaintiffs and others similarly situated.

(c) From expending public funds in aid of, or in reimbursement of money paid for, the attendance of any child at any private school which, for reason of race, excludes the infant plaintiffs and others similarly situated, and

(d) From crediting any taxpayer with any amount paid or contributed to any private school, which for reason of race, excludes the infant plaintiffs and others similarly situated.

The said appellants have heretofore given notice, and they hereby again give notice, of their appeal to the United States Court of Appeals for the Fourth Circuit from the order of this Court entered in the above captioned action May 24, 1962, by which the motion of the defendant County School Board of Prince Edward County, Virginia, for a summary judgment as to the cause of action alleged in Section V of the Amended Supplemental Complaint was granted and said Section V was dismissed and the Clerk

was directed to enter a final judgment in favor of said defendant school board.

S. W. TUCKER,
Of Counsel for Appellants.

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Counsel for Appellants.

[fol. 91]

APPENDIX

To Reply Brief of the Board of Supervisors of Prince Edward County, Appellees, and Brief of the Board of Supervisors of Prince Edward County, Cross Appellants.

[fol. 93]

MOTION OF THE BOARD OF SUPERVISORS OF PRINCE EDWARD COUNTY TO DISMISS AMENDED SUPPLEMENTAL COMPLAINT

The Board of Supervisors of Prince Edward County, Virginia, having been made a party defendant to this action by amended supplemental complaint, by order entered on the 24th day of April, 1961, moves the court as follows:

I.

To dismiss the amended supplemental complaint upon the ground that it states a new cause of action in that the original cause of action alleged racial discrimination in the admission, enrollment and education of Negro children in the public schools of the County and sought an injunction against such alleged discriminatory practices, whereas the amended supplemental complaint sets forth an alleged duty under the Constitution and laws of the State of Virginia, requiring the Board of Supervisors of Prince Edward County to levy taxes and to appropriate money for the operation of public schools and seeks affirmatively to compel said Board of Supervisors to levy taxes and appropriate money for such purposes, the prayer of the said amended supplemental complaint and this defendant being entirely foreign to the purposes and prayers of the original complaint and to the order of April 22, 1960, entered thereon.

[fol. 94]

II.

To dismiss the amended supplemental complaint upon the ground that it appears upon the face of the amended supplemental complaint when read with the original complaint and the order of April 22, 1960, entered thereon that

neither the original complaint nor the order of April 22, 1968, has any reference whatever to any alleged legal obligation requiring the operation of public schools in Prince Edward County, nor to any alleged legal obligation resting upon the Board of Supervisors of Prince Edward County to operate public schools within the said County or to the levy of taxes of appropriation of money by the said Board of Supervisors for said purpose. Consequently, the alleged actions of the Board of Supervisors of said County, as a matter of law, do not violate the terms of the said order nor do they violate any purported rights of the plaintiffs under or by virtue of said order.

III.

To dismiss the allegations contained in Paragraph 16 of the amended supplemental complaint as to this defendant upon the ground that the Board of Supervisors of Prince Edward County has no power, control or responsibility with respect to the conveyance, lease or transfer of public schools or public school property in Prince Edward County.

IV.

To dismiss the amended supplemental complaint as to it for lack of jurisdiction upon the ground that it appears the power upon the face of the amended supplemental complaint [fol. 95] that the Board of Supervisors of Prince Edward County acted in the exercise of valid and constitutional powers reposed in it under the Constitution and laws of the State of Virginia in its refusal to levy taxes and appropriate money for the operation of public schools within the County, and that the order sought against the said Board of Supervisors of Prince Edward County constitutes this a suit against the Commonwealth of Virginia of which this court does not have jurisdiction by virtue of the prohibition of the Eleventh Amendment of the Constitution of the United States.

V.

To dismiss the amended supplemental complaint as to it for lack of jurisdiction upon the ground that the power

of taxation and the appropriation of public funds is a legislative power which cannot be exercised other than under legislative authority and in strict compliance with the legislative requirements for its exercise, and the prayer of the amended supplemental complaint, in effect, asks a federal court to exercise an exclusively legislative power by compelling a local legislative body to levy taxes and to appropriate money, which is beyond the limits of the judicial power conferred upon this court under the Constitution of the United States, and which raises a political question with which federal courts have consistently refused to interfere.

VI.

To dismiss the amended supplemental complaint upon the ground that it raises questions which require a construction of provisions of the Constitution of Virginia [fol. 96] and statutes enacted by the legislature of the Commonwealth of Virginia in pursuance thereof relating to matters of the most delicate nature involving federal-state relations; that a final authoritative determination of these issues cannot be accomplished in this court but must be accomplished in the Supreme Court of Appeals of Virginia, which has the final authority for construction of the provisions of the Constitution of Virginia and the statute here involved; that the doctrine of equitable abstention should be followed in this case and that the amended supplemental complaint should be dismissed and the complainants permitted to seek a construction of the said constitutional provisions and statutes in the State courts as they may be advised, there being available speedy and adequate procedures, and by following such course any possible federal questions which may be considered to have been raised by the amended supplemental complaint may never be raised.

VII.

The Board of Supervisors of Prince Edward County moves the court to dismiss the amended supplemental complaint because it fails to state a case upon which relief may

be granted; because it fails to state or allege facts giving rise to a federal question; because it seeks to convert the Fourteenth Amendment and the order of April 22, 1960, into an affirmative mandate extending not only to the original defendant, the School Board of Prince Edward County, but affirmatively extending to this defendant and the other new defendants added thereby; because it seeks to extend the federal judicial power into the area of state legislative discretion by prayer for a mandamus in the form of a negative injunctive decree and thereby seeks to restrict individual freedom guaranteed by the Constitu- [fol. 97] tion of the United States; because it seeks to extend federal judicial power to unconstitutional control of state administration of education and seeks to extend the said federal judicial power into the impractical supervision of the details of school administration.

All of which appears upon the face of the amended supplemental complaint as follows:

(1) The levy of taxes by the Board of Supervisors of Prince Edward County is clearly within the discretion vested in said Board by Section 136 of the Constitution of Virginia and by Section 22-127 of the Code of Virginia and the amended supplemental complaint does not allege that any provision of the Constitution of Virginia or of the state law vesting said power in the Board of Supervisors of Prince Edward County is repugnant to the Constitution of the United States or that the same has been exercised by the said Board of Supervisors in a manner repugnant to the Constitution of the United States.

Prayer (a) of the amended supplemental complaint is in effect a prayer for a mandamus by the federal judiciary to a state legislative body to compel the levy of taxes and the appropriation of money for public schools, which, as a matter of law, is not a matter within the jurisdiction of a federal court and as a matter of law does not violate the Fourteenth Amendment or the order of April 22, 1960, entered in this cause.

(2) Prayer (b) of the amended supplemental complaint does not ask the court to declare any law of the Com-

monwealth of Virginia or any ordinance of the Board of Supervisors repugnant to the Constitution of the United States, but on the contrary is a prayer that the federal [fol. 98] judiciary, by use of its injunctive power, exercise an affirmative, purely legislative function and, in effect, is a prayer for the judiciary to amend all ordinances of the County and laws of the Commonwealth of Virginia by which any money may be paid directly or indirectly to any private school so as to provide that by the payment or acceptance of such money a private school receiving the same forfeits its freedom to accept or reject students as it may choose.

The judicial action prayed for would (1) constitute a violation of the negative nature and terms of the Fourteenth Amendment, (2) would constitute an unconstitutional invasion by the federal judicial branch of legislative discretion vested in the legislative branch of state government in violation of the most fundamental principle of the United States Constitution and of a Republican form of government, (3) would constitute an extension of the prohibitions of the Fourteenth Amendment into the area of individual and private action and choice in violation of the express limitations of the Fourteenth Amendment and in violation of freedoms guaranteed by other provisions of the United States Constitution to private individuals.

(3) Prayer (c) of the amended supplemental complaint, does not ask the court to declare any law of the Commonwealth of Virginia or any ordinance of the Board of Supervisors repugnant to the Constitution of the United States, but is a prayer that the judiciary, by the use of its injunctive power, exercise an affirmative legislative function and, in effect, amend all ordinances and all laws of the Commonwealth of Virginia by which money may be paid to parents or individuals in aid of the education [fol. 99] of children or individuals so as to restrict the freedom of such parent or individual to seek education in such environment and association as such parent or individual may select.

The judicial action prayed for is (1) in violation of the negative terms and nature of the Fourteenth Amend-

ment, (2) an unconstitutional invasion by the federal judiciary of the area of legislative discretion, and is, in short, a mandamus to the legislative branch, (3) is an extension of the prohibitions of the Fourteenth Amendment into the area of private, parental and individual action in violation of the express limitations of the Fourteenth Amendment to state action, and (4) is a violation of freedoms secured to such parents and persons under other provisions of the United States Constitution.

(4) Prayer, (d) of the amended supplemental complaint does not ask the court to declare the ordinance under which the tax credit referred to is granted or the state statute upon which the same is based to be repugnant to the Constitution of the United States, but is a prayer that the federal judiciary, by the exercise of its injunctive power, exercise an affirmative and purely legislative function and, in effect, is a prayer that the court amend the County ordinance and the state law upon which it is based so as to provide that the tax credits authorized therein be given only for contributions made to such private schools as do not exclude applicants upon the basis of race.

The judicial action prayed for is (1) in violation of the negative nature and terms of the Fourteenth Amendment, (2) is an unconstitutional invasion by the judicial branch of legislative discretion reposed in a legislative branch [fol. 100] of the state government, and is in short a prayer for a mandamus to such legislative branch, (3) is an extension of the Fourteenth Amendment into the area of private individual action in violation of the express limitations of the Fourteenth Amendment to state action, and (4) is an unconstitutional restriction of and violation of freedoms secured to individual tax payers by other provisions of the United States Constitution.

(5) Prayer (e) of the amended supplemental complaint is not based upon any allegation that such leasing, conveyance or transfer of school property constitutes a violation of any provision of the United States Constitution or of the order of April 22, 1960, or of any other provision of federal law.

The judicial action prayed for is (1) in violation of the negative nature and terms of the Fourteenth Amendment, (2) would constitute an invasion by the federal judicial branch of administrative discretion lawfully vested in the School Board of Prince Edward County under the Constitution and laws of the Commonwealth of Virginia, and (3) would require a supervision of the details of administrative judgment beyond the practical reach of the process of a court of equity.

(6) The amended supplemental complaint Paragraph I (2) alleges that the state law requires the maintenance of a system of free public schools and that the failure to maintain such schools in Prince Edward County while a system of public schools are maintained in other counties and cities of the Commonwealth constitutes a violation of the due process and equal protection clauses of the Fourteenth Amendment. Such allegation does not support [fol. 101] prayer (a) of the amended supplemental complaint for the following reasons:

The Fourteenth Amendment does not deny to Virginia the right to grant to each county and city local control of the education of its children, nor does it deny to Virginia the right to grant to each county and city of Virginia the option to provide for the educational needs of its children either in (1) public schools owned, operated and controlled by said counties or cities, or, if it prefers (2) to provide for such education by the payment of a sum for educational expenses to the parent or other person immediately responsible for such education in reimbursement of expenses so incurred.

In connection with this allegation the court will take judicial notice of Section 141 of the Constitution of Virginia and the provision of Title 22 of the Code of Virginia enacted in pursuance thereof.

It is, therefore, not sufficient merely to allege, as does the amended supplemental complaint, that Prince Edward has exercised a lawful right and elected to provide for the education of its children under Section 141 of the Constitution of Virginia and laws enacted in pursuance thereof.

It is essential in order to raise a federal constitutional question under the Fourteenth Amendment to allege that the laws of Virginia give some benefit or privilege to or impose some burden or disadvantage upon the county or city of the state which is not given to or imposed upon all counties or cities of the state, or, it must be alleged that the laws of the State of Virginia and of Prince Edward County give some benefit to or impose some disadvantage upon one individual or class which is not given [fol. 102] to or imposed under such law to or upon all children of the said County.

It is, therefore, apparent that where the law gives every county and city within the Commonwealth of Virginia the privilege, if it so elects, to provide for the education of its children in the same manner in which the County of Prince Edward has elected to provide for its children, such law and arrangement does not deny equal protection as between the counties and cities of the Commonwealth of Virginia.

The county ordinances exhibited with the supplemental complaint show upon their face that they apply equally within the County to all individuals and classes and are, therefore, not in violation of the Constitution of the United States. The equal administration of said county ordinances is not brought into question by any allegation of the amended supplemental complaint.

It, therefore, follows that there is no sufficient allegation contained in the amended supplemental upon which to base a charge of a violation of equal protection or due process under the Fourteenth Amendment of the United States Constitution.

(7) Paragraph VI (17) alleges that acts otherwise lawful become unlawful if done for the purpose and in order to avoid placing the children of the County within schools which fall within terms of the court order of April 22, 1960. It is alleged that by doing such acts or by the failure to take affirmative acts a federal constitutional question is raised. Such an allegation is patently insufficient to raise any federal constitutional question and is patenty untenable. Neither the terms of the order of April 22, 1960,

[fol. 103] nor the language and judicial construction of the Fourteenth Amendment can be thus enlarged by the motive or purpose of a legislative body which enacts laws otherwise within its lawful constitutional power. The motives or purpose of the Board of Supervisors of Prince Edward County cannot change or alter or enlarge the express limits of the court order of April 22, 1960, nor change, alter or enlarge the language, nature and judicial construction of the Fourteenth Amendment of the Constitution of the United States. Unless the acts and laws referred to violate some right of the plaintiffs under the United States Constitution or are alleged to be administered in such a fashion as to deny the plaintiffs a right under the Constitution of the United States the motive and purpose of the legislative branch is utterly immaterial and irrelevant provided the legislative branch had the power to enact the laws referred to.

It is, therefore, respectfully submitted that the amended supplemental complaint should be dismissed and the plaintiff left to seek his remedies as he may be advised in the state courts.

Present: All the Justices

Record No. 5390.

Leslie Francis Griffin, Jr., an Infant, Suing by L. F. Griffin, Sr., his Father and Next Friend, and L. F. Griffin, Sr.,

v.

[fol. 104] Board of Supervisors of Prince Edward County

Opinion By Chief Justice John W. Eggleston
Richmond, Virginia, March 5, 1962

Original Petition for Writ of Mandamus

This is an original petition for a writ of mandamus filed by Leslie Francis Griffin, Jr., an infant, suing by L. F.

Griffin, Sr., his father and next friend, and L. F. Griffin, Sr., in his own right, hereinafter referred to as the petitioners, to compel the Board of Supervisors of Prince Edward county, sometimes hereinafter referred to as the respondent, to appropriate and make available to the School Board of that county sufficient funds for the operation and maintenance for the 1961-1962 school term, and subsequent terms, of such public free schools as in the judgment of the School Board the public welfare requires. The matter is before us on the petition, the answer and a stipulation, from which these facts appear:

Both petitioners are citizens of the Commonwealth of Virginia, residing in Prince Edward county. The infant petitioner is within the age limits of eligibility to attend public schools and possesses the qualifications necessary for admission thereto. His father, the adult petitioner, is a taxpayer of the Commonwealth and of Prince Edward county.

Beginning with the fiscal year 1959-1960, and thereafter for each succeeding fiscal year, the School Board has prepared and submitted to the Board of Supervisors an estimate of the amount of money deemed necessary for the [fol. 105] maintenance and operation of public schools in the county. For each of these fiscal years the Board of Supervisors has failed and refused to appropriate any money for such purpose. However, for the fiscal year 1961-1962, it appropriated the sum of $285,000 for "Educational Purposes in furtherance of the elementary and secondary education of children residing in Prince Edward county in private nonsectarian schools to be expended as may be provided by Ordinance and pursuant to Section 141 of the Constitution of Virginia," as amended.

The petition alleges that the respondent's failure and refusal to appropriate funds for the maintenance and operation of public free schools in the county was occasioned by the decision of the United States Court of Appeals for the Fourth Circuit on May 5, 1959, that white and colored children should be enrolled and taught together. *Allen* v. *County School Board of Prince Edward County*, 4 Cir., 266 F. 2d 507. However, in the petitioners' brief

it is "conceded" that the motives which prompted the inaction on the part of the Board of Supervisors are immaterial to the issues involved in the present litigation.

The petitioners further point out in their brief that "there are no Federal questions [involved] in this proceeding," and we perceive none.

The petition further alleges that "by reason of Article IX of the Constitution of Virginia, and particularly Sections 129 and 136 thereof, and the several statutes which have been enacted pursuant to said article, it is the duty of the respondent board of supervisors to appropriate money to be used by the County School Board of Prince Edward County for the maintenance and operation of such [fol. 106] public free schools as in the judgment of said school board the public welfare may require."

The respondent denies that these or any other provisions of the Constitution of Virginia, or of any statutes enacted by the General Assembly, "impose a duty upon the said Board of Supervisors to appropriate any revenue under its control for the operation of schools." It alleges that its failure to levy taxes and make appropriations for the maintenance and support of such schools are matters which "are wholly within the legislative discretion vested in said Board of Supervisors under the Constitution and laws of Virginia and are not subject to control by the judicial process of writ and mandamus as prayed for in the petition."

Thus the pleadings present to us these questions:

(1) What is the duty imposed by law on the Board of Supervisors of Prince Edward county with respect to appropriations for the maintenance and operation of public free schools? (2) Will a writ of mandamus lie to compel that Board to perform such duties as are imposed on it by law with respect to such appropriations?

The argument on behalf of the petitioners runs thus: Section 136 of the Constitution imposes on the Board of Supervisors the *mandatory duty* of levying and collecting local school taxes for establishing and maintaining such schools as in the judgment of the local school authorities the public welfare may require; the Board of Supervisors is a mere administrative agency with respect to such duties and is vested with no legislative discretion therein; hence,

mandamus will lie to require it to perform its duties in this respect.

[fol. 107] The substance of the argument of the Board of Supervisors is that it is the legislative department of the county; that in levying taxes and appropriating local funds it exercises a legislative function and is vested with a discretionary power as to what taxes, if any, will be levied and appropriated, and that such discretion is not subject to judicial control.

Section 136 of the Constitution reads thus:

> "Each county, city or town, if the same be a separate school district, and school district is *authorized* to raise additional sums by a tax on property, subject to local taxation, not to exceed in the aggregate in any one year a rate of levy to be fixed by law, to be apportioned and expended by the local school authorities of said counties, cities, towns and districts in establishing and maintaining such schools as in their judgment the public welfare may require; provided that such primary schools as may be established in any school year shall be maintained at least four months of that school year, before any part of the fund assessed and collected may be devoted to the establishment of schools of higher grade. The board of supervisors of the several counties, and the councils of the several cities and towns, if the same be separate school districts, shall provide for the levy and collection of such local school taxes." (Emphasis added)

Article IX of the Constitution, embracing the subjects of "Education and Public Instruction," contemplates that moneys for the establishment and maintenance of public free schools will be appropriated partly by the General [fol. 108] Assembly and partly by the local governing units. Section 136 provides for the raising by local taxation of "additional sums", that is, sums in addition to those which the General Assembly may appropriate pursuant to the preceding sections of the Constitution.

The provisions of Section 136 are implemented in Code, SS 22-126 and 22-127, as amended. Section 22-126, as amended, reads as follows:

"Each county, city and town if the town be a separate school district, *is authorized* to raise sums of money by a tax on all property, subject to local taxation, at such rate as may be deemed sufficient, but in no event more than three dollars on the one hundred dollars of the assessed value of the property in any one year to be expended by the local school authorities in establishing, maintaining and operating such schools as in their judgment the public welfare requires and in payment of scholarships for the furtherance of elementary or secondary education and transportation costs as required or authorized by law; * * *" (Emphasis added.)

Section 22-127, as amended, reads:

"The governing body of any county, city, or town, if the town be a separate school district, *may, in its discretion,* make a cash appropriation, either annually, semi-annually, quarterly, or monthly, from the funds derived from the general county, city or town levy and from any other funds available, of such sums as in its judgment may be necessary or expedient for the establishment, maintenance and operation of public schools, and/or for educational purposes." (Emphasis added.)

[fol. 109] We find in neither Section 136 of the Constitution nor in the statutes implementing it, any support for the petitioners' contention that the Board of Supervisors is under the mandatory duty to levy local taxes and appropriate moneys for the support of public free schools in the county.

By the first sentence of the Constitutional provision the local political unit "is authorized" to raise additional sums, to be apportioned and expended by the local school authorities. It will be noted that such political unit "is authorized," not "required," to raise the additional sums. The words "is authorized" denote a grant of power and discretion to act, but not a command or requirement to act. According to Webster's Third New International Diction-

ary, Unabridged, "authorized" means "endowed with authority," "sanctioned by authority." As we said in *Superior Steel Corp.* v. *Commonwealth*, 147 Va. 202, 205, 136 S.E. 666, 667, "one is 'authorized' when he possesses the authority to act."

Nor do we agree with the contention on behalf of the petitioners that the closing sentence of the constitutional provision, "The boards of supervisors of the several counties, and the councils of the several cities and towns, if the same be separate school district, shall provide for the levy and collection of such local school taxes," imposes a mandatory duty on the Board of Supervisors to levy and appropriate these moneys. This sentence merely designates the governing bodies of the respective political units which "shall provide for the levy and collection of *such* local school taxes" (emphasis added), that is, the local school taxes which are "authorized" tc be levied by the first sentence in the section.

[fol. 110] This interpretation of the constitutional provision is quite in accord with our previous decisions. In *School Board of Carroll County* v. *Shockley*, 160 Va. 405, 168 S.E. 419, we had under consideration an act of the General Assembly requiring the board of supervisors of Carroll county to make a special levy, in addition to all other levies, and directing that the proceeds of such special levy be used solely for the purpose of erecting and equipping a high school building in the town of Hillsville in that county. We held that the act was in conflict with Section 136 of the Constitution which lodged in the local authorities the exclusive power to determine what additional sums, if any, should be raised by local taxation, and that that power could not be taken away by the General Assembly.

After reviewing the various provisions of Article IX of the Constitution relating to "Education and Public Instruction," and what funds must be appropriated by the General Assembly for that purpose, we thus defined the purpose and meaning of Section 136:

> "Considering these clear and unqualified provisions, as placed in the Constitution, and in connection with the related provisions thereof, it is obvious that it

> was the purpose of this section to vest in the local authorities of each county and school district of the State the *exclusive power* to determine *what additional sums, if any,* should be raised by local taxation to supplement the funds provided by the State for the support of the schools in the respective counties and school districts; and the *exclusive power* to levy the tax for school purposes on the property specified, *if any is imposed,* subject only to the limitation that *if any tax at all is levied* it shall not 'exceed in the ag- [fol. 111] gregate in any one year a rate of levy to be fixed by law'. (Emphasis added)
>
> "The local authorities of each county and school district being thus vested with the exclusive power to impose local taxes for school purposes under this section, the necessary implication is that the General Assembly is prohibited by the Constitution from exercising that power." 160 Va., at page 413.

This interpretation, which is quite applicable in the present case, was reaffirmed in *Almond* v. *Gilmer,* 188 Va. 1, 26, 49 S.E. 2d 413, 444.

This discretionary nature of the right, power, or authority of the board of supervisors to determine what sums, if any, should be raised by local taxation for the support of public schools was also reaffirmed in *Scott County School Board* v. *Board of Supervisors,* 169 Va. 213, 217, 193 S.E. 52, 54. In that case the county school board filed in this court an original petition for mandamus to compel the board of supervisors to impose a levy sufficient "to take care of the budget" prepared by the school board. The school board asserted that the board of supervisors had "no discretion in acting upon the school budget," but "must raise the necessary revenue to take care of "such budget as submitted. (169 Va. at page 215, 193 S.E., at page 53.) We denied the writ on the ground that mandamus did not lie "to control [the] discretion" to curtail the school budget which the statutes (Code of 1919, S 657)[1] had lodged in the board of supervisors. 169 Va., at page 217, 193 S.E. at page 54.

[1] Cf. Code of 1950, 1960 Cum. Supp., SS 22-120.3 and 22-120.4.

[fol. 112] See also, *Board of Supervisors of Chesterfield Co.* v. *County School Board,* 182 Va. 266, 280, 281, 28 S.E. 2d 698, 705 in which we affirmed the holding of the trial court that "the board of supervisors has the right, within the limits prescribed by law, *in their discretion,* to fix the amount of money to be raised by local taxation for school purposes at whatever amount they see fit." (Emphasis added.)

It is clear, then, that Section 136 of the Constitution and Code, SS 22-126 and 22-127, as amended, which implement the constitutional provision, vest in the Board of Supervisors of Prince Edward county the discretionary power and authority to determine "what additional sums, if any, should be raised by local taxation to supplement the funds provided by the State for the support of the schools" in the county. *School Board of Carroll County* v. *Shockley, supra,* 160 Va., at page 413.

Whatever may be the duty imposed under Section 129 of the Constitution, that section is plainly directed to the General Assembly and not to the local governing bodies. It says, "The General Assembly shall establish and maintain an efficient system of public free schools throughout the State." Hence, we are not concerned in the present proceeding with the application of that provision. But it is important to compare the mandatory wording of that section with the discretionary language employed in Section 136.

We do not agree with the petitioners' contention that the concluding sentence of Section 136, which provides that "The board of supervisors of the several counties, and the councils of the several cities and towns, * * * shall [fol. 113] provide for the levy and collection of such local taxes," imposes on these local governing units merely ministerial duties. There is no constitutional mandate as to how these levies and collections shall be made, and as we have said, the concluding sentence of the section vests this function in these local governing units. This is in accord with the provision in Section 111 of the Constitution that boards of supervisors of a county "may * * * lay the county and district levies."

Since the early days of the Commonwealth, we have repeatedly pointed out that the exercise of the power of

taxation is a legislative function. See 18 Mich. Jur., Taxation, S 5, p. 127 *ff.*, where numerous cases are collected. The same is true when the power is exercised by a local governing unit. *Southern Railway Co.* v. *City of Danville*, 175 Va. 300, 305, 7 S.E. 2d 896, 898.

It is firmly settled in this State that mandamus is the proper remedy to compel the performance of a purely ministerial duty, but does not lie to compel the performance of discretionary duty. 12 Mich. Jur., Mandamus, S 6, p. 340 *ff.*; Burks Pleading and Practice, 4th Ed., S 199, p. 322; *Scott County School Board* v. *Board of Supervisors, supra*, 169 Va., at page 217, 193 S.E., at page 54; *State Board of Education* v. *Carwile*, 169 Va., 663, 673, 194 S.E. 855, 859; *Fleenor* v. *Dorton*, 187 Va., 659, 664, 47 S.E. 2d 329, 332.

Whether mandamus will lie to compel the levy and assessment of taxes depends upon whether the duty with respect to that matter is ministerial or discretionary. If ministerial, the writ will lie; if discretionary, as is the case here, mandamus will not lie. 34 Am. Jur., Mandamus, S. [fol. 114] 214, pp. 982, 983; 55 C.J.S. Mandamus, S 182-b (4), pp. 355, 356. Application of this distinction has been recognized and applied in prior decisions of this court.

In *Supervisors of Cumberland County* v. *Randolph*, 89 Va. 614, 16 S.E. 722, relied upon by the petitioners, we affirmed a judgment of the county court awarding a mandamus compelling the board of supervisors to levy a tax to pay certain coupons on bonds which had been issued by the county. This was because, we said, the particular statute there involved required the levy and made the duties of the board of supervisors with respect thereto "purely ministerial". 89 Va., at page 622.

On the other hand, in *Scott County School Board* v. *Board of Supervisors, supra*, we denied a writ to compel the board of supervisors to impose a levy sufficient to take care of the budget prepared by the school board, on the ground that mandamus did not lie to control the discretion which had been lodged in the board of supervisors with respect to the matter. 169 Va. at page 217, 193 S.E. at page 54.

It is not our function here to say whether the action of the Board of Supervisors of Prince Edward county in refusing to make these appropriations is proper, wise, or desirable. Our duty is merely to determine whether it may be compelled to do so by a writ of mandamus. In our view it may not be so compelled.

The Constitution of Virginia vests in the legislative department of the government the duty, power and authority to establish and maintain public free schools throughout the State. To grant the writ in this proceeding would [fol. 115] amount to an invasion by the judicial department of those functions of the legislative department. It would mean that this court may substitute its discretion for that vested by law in the local legislative body. Clearly, under the division of powers embodied in our Bill of Rights (Constitution, S 5), we may not do this.

For these reasons the writ prayed for is denied.

Writ denied.

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SECTION I

How Such Application Made, What It Shall Contain

A. The parent, guardian or person in loco parentis to any child shall make application for such grants upon forms provided by the Board of Supervisors of Prince Edward County, shall sign the same and make oath to the facts therein stated and shall file the same on or before the 1st day of September, 1960 or any succeeding year with the Board of Supervisors of Prince Edward County or with such person as the Board may designate to receive and examine such application.

B. The parent, guardian or person in loco parentis to such child in order to be eligible to receive a grant of funds under this ordinance shall, as a part of such application, make oaths to the following facts:

(a) The name of the parent, guardian or person in loco parentis making the application and the name, age and

[fol. 116] residence of each child on whose behalf the application is made.

(b) That the person signing the application is legally responsible for the care of each child for whose benefit the application is made.

(c) That each child in whose behalf the application is made has attained six years of age and has not attained the age of twenty years.

(d) That the said child is an actual bona fide resident of Prince Edward County and is educable.

(e) That each child on whose behalf the application is filed will be enrolled in either a private nonsectarian elementary or secondary school within the County of Prince Edward or a public school within the State of Virginia wherein tuition is charged in a least the amount of the grant applied for.

(f) That said child is not detained or confined in any public institution.

(g) That said child is or will be enrolled during the school year for which the application is made in a course of systematic educational instruction or training of not less than one hundred eighty days duration or the substantial equivalent thereof, and shall give the name and location of said school, or the name of the person, or persons, offering such course of instruction or training and the place at which it will be offered.

(h) That said child has not graduated or completed the course of study offered at the high school level.

[fol. 117] (i) That the person making the application agrees to refund any grant made thereunder if said child for whom the grant is made fails to attend school at least one hundred fifty days per school year, unless the Board of Supervisors by resolution releases such obligation to refund on account of sickness of the child or other unavoidable or oppressive circumstances.

Section II

Minimum Amount of Grant: Discretion to Increase the Amount; How and to Whom Paid; Termination Thereof . . .

(1) The amount of each grant paid under this Ordinance shall be a sum not less than One Hundred Dollars ($100.00) per year for each child and the amount thereof may be increased in the discretion of the Board of Supervisors by resolution adopted on or before the end of any fiscal year.

(2) Upon approval by the Board of Supervisors of the application therefor it shall by resolution make appropriation for the payment of each grant and shall authorize the Treasurer to make payment thereof upon warrants of the Board of Supervisors, as provided by law, for the payment of other claims against the County.

(3) Upon denial of an application or inability to act thereon because of the absence of necessary information, the Board shall give notice to the applicant of its action within a reasonable time thereafter by mailing said notice to the post office address given in the application. Within 15 days after the mailing of said notice any applicant who feels aggrieved by the action of the Board shall file with [fol. 118] the Board or its designated agent a petition for a review of its action. Such petition shall state the reasons for his objection to the action of the Board and shall be heard by the Board at its next meeting provided the said meeting is at least 15 days after the filing date of the petition for such hearing. Such hearing shall be informally conducted and the aggrieved party shall have the right to offer evidence and to be represented by counsel.

Within 15 days after such hearing the Board shall notify such aggrieved party of its final action upon such application and any applicant feeling aggrieved thereby shall have the right of appeal to the Circuit Court of the County of Prince Edward as provided by law.

(4) The Board of Supervisors shall pay not more than half of any grant on or before the 15th day of October of the school year for which paid and the remainder at such intervals as it may deem proper, provided that the

total amount thereof shall be paid not later than the 31st day of May of the school year for which the grant is made, and provided further that upon the violation of any condition set forth in the application therefor or upon the ascertainment that any false representation has been made in procuring said grant, the Board shall terminate the same and any balance thereof shall not be paid.

SECTION III

Defining Unlawful Acts in Violation of This Ordinance and Prescribing Penalty Therefore . . .

A. Any person who shall wilfully make a false statement in any application for a grant under this Ordinance shall [fol. 119] be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not to exceed three hundred dollars ($300.00) or by confinement in jail not exceeding 30 days.

B. It shall be unlawful and constitute a misdemeanor for any person, firm, association or corporation receiving a grant for educational purposes under this Ordinance to use the sum so received for any purpose other than for educational purposes in a private nonsectarian school located within the County of Prince Edward or in public schools located within the State of Virginia. Any person violating this section shall be subject to a fine not exceeding three hundred dollars ($300.00) or confinement in jail not exceeding 30 days.

• • • • • • •

Be It Ordained by the Board of Supervisors of Prince Edward County, Virginia that:

(1) Contributions made by any person, association, firm, corporation or other taxpayer of the County of Prince Edward, Virginia to a nonprofit nonsectarian private school located within said County of Prince Edward, Virginia may be deducted from the real and personal property taxes due the County of Prince Edward, Virginia by the person, association, firm, corporation or other taxpayer making such contribution for the year during which

said contribution was made, subject to the limitations set forth in this ordinance.

(2) For the purpose of this Ordinance, the term "private school" shall mean only those nonprofit, nonsectarian private elementary and secondary schools either in opera- [fol. 120] tion during the year for which the tax deduction or credit is claimed or chartered to begin operation within the year succeeding that for which the tax deduction or credit is claimed, which schools are located in the County of Prince Edward, Virginia and which offer or will offer during the time herein set forth a course of systematic educational instruction of not less than one hundred eighty days duration per school year or the substantial equivalent thereof.

(3) No credit shall be allowed for any contribution made to any private school under the provisions of this ordinance unless the person, association, firm, corporation or other taxpayer seeking such credit files with the Treasurer of the County of Prince Edward, Virginia at the time his, her, or its taxes are due and payable, To wit: On or before December the fifth in the year in which the levy is made, a voucher, receipt or canceled check showing the amount and date of the contribution and to whom made and his, her, or its affidavit setting forth the name and address of the school to which the contribution was made, the date thereof, the name and address of the person, association, firm, corporation or other taxpayer of the County of Prince Edward, Virginia making such contribution, the amount thereof, and declaring that no scholarship, reduction in fees or charges, rebate or remission of charges or other benefit was granted such person, association, firm, corporation or other taxpayer or his or her children, or any child for which said person, association, firm, corporation or other taxpayer was the legal guardian or other person in loco parentis to such child directly or indirectly as a result of such contribution and declaring that no such refund, rebate, reduction in fees or charges or remission or charges or other benefit will be made to [fol. 121] such person, association, firm, corporation or taxpayer on account of such contribution.

Upon the presentation of such affidavit and supporting evidence of payment to the Treasurer of the County of Prince Edward he shall deduct from the amount of taxes due the County of Prince Edward by such person, firm, association, corporation or other taxpayer on account of real estate taxes or personal property taxes the amount of such contribution credit in no event to exceed 25 per centum of the total taxes due the County of Prince Edward on real estate and personal property by such taxpayer. When such person, firm, association, corporation or other taxpayer shall have paid the balance remaining of such taxes due by such person, firm, association, corporation or taxpayer to the County of Prince Edward, Virginia, he shall thereupon be discharged from any further liability for taxes assessed against his, her or its personal or real property by the County of Prince Edward, Virginia for the year in which such taxes were payable.

(4) Upon denial of an application for credit, the Treasurer shall give notice to the applicant of his action within a reasonable time thereafter by mailing said notice to the Post Office address given in the application. Within 15 days after the mailing of said notice any applicant who feels aggrieved by the action of the Treasurer shall file with the Board or its designated agent a petition for a review of his action. Such petition shall state the reasons for his objection to the action of the Treasurer and shall be heard by the Board of Supervisors at its next meeting provided the said meeting is at least 15 days after the filing date of the petition for such hearing. Such hearing [fol. 122] shall be informally conducted and the aggrieved party shall have the right to offer evidence and to be represented by counsel.

Within 15 days after such hearing the Board shall notify such aggrieved party of its final action upon such application and any applicant feeling aggrieved thereby shall have the right of appeal to the Circuit Court of the County of Prince Edward as provided by law.

(5) The Treasurer of Prince Edward County shall in no case be liable upon his bond or otherwise for any credit

granted any person, firm, corporation, association or other taxpayer under this Ordinance provided the voucher, receipt or cancelled check and the affidavit required by this Ordinance executed by the person, firm, association or other taxpayer are filed with the Treasurer as herein required.

(6) It shall be unlawful and constitute a misdemeanor for any person falsely to claim a credit or seek to falsely claim a credit against his taxes not in accordance with the provisions of this Ordinance. Any person violating this Ordinance shall be subject to a fine not exceeding $300.00 or confinement in jail not exceeding thirty days.

[fol. 123]

APPENDIX

To The Brief of The State Board of Education And Superintendent of Public Instruction of the Commonwealth of Virginia

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[fol. 124]

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

Civil Action No. 1333

EVA ALLEN, ET AL., Plaintiffs

v.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, ET AL., Defendants

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NOTICE OF APPEAL—Filed November 7, 1962

Notice is hereby given that the State Board of Education of the Commonwealth of Virginia and Woodrow W. Wilkerson, Superintendent of Public Instruction of the Commonwealth of Virginia, hereby appeal to the United States

Court of Appeals for the Fourth Circuit from the judgment entered by orders in the above-styled cause on October 10, 1962, and from so much thereof:

(1) As fails to grant and, in effect, denies the motion filed May 1, 1961, on behalf of the above-named appellants to dismiss the Amended Supplemental Complaint as to them for any of the grounds stated therein, said motion having been timely renewed in accordance with subsequent orders of the Court reserving decision thereon and permitting such renewals;

(2) As denies the motion of all defendants, including [fol. 125] above-named appellants, to dismiss, or in the alternative to abstain from determining the issues presented in, the Amended Supplemental Complaint;

(3) As restrains and enjoins the above-named defendants from processing or approving any applications for State scholarship grants from persons residing in Prince Edward County so long as the public schools of Prince Edward County remain closed; and

(4) As holds that the public schools of Prince Edward County may not be closed to avoid the effect of the law of the land as interpreted by the Supreme Court while the Commonwealth of Virginia permits other public schools to remain open at the expense of the taxpayers, if this portion of said judgment order has such finality as permits appeal.

Robert Y. Button, Of Counsel for the State Board of Education of the Commonwealth of Virginia and the Superintendent of Public Instruction of the Commonwealth of Virginia.

Robert Y. Button, Attorney General of Virginia;
R. D. McIlwaine, III, Assistant Attorney General;
Supreme Court—State Library Building, Richmond 19, Virginia;

Frederick T. Gray, Special Assistant, State-Planters Bank Building, Richmond 19, Virginia.

[fol. 126] Certificate of service (omitted in printing).

In United States District Court

Motion to Dismiss—Filed May 1, 1961

Now come Woodrow W. Wilkerson, Superintendent of Public Instruction, and Colgate W. Darden, Lewis F. Powell, Jr., Gladys V. V. Morton, William J. Story, Jr., Leonard G. Muse, Louise F. Galleher and Mosby Garland Perrow, Jr., individually and constituting the State Board of Education, and move the Court to dismiss the amended supplemental complaint herein upon the following grounds:

1. The amended supplemental complaint alleges a new and distinct cause of action different from that which formed the basis of the original complaint and seeks relief foreign to the purposes of the original complaint against persons not parties to the original suit.

2. The Court is without jurisdiction to entertain the amended supplemental complaint because the suit sought to be maintained thereby is, in its direct purpose and effect, a suit against the Commonwealth of Vir- [fol. 127] ginia, which has not consented to be sued, and the judicial power of the United States does not extend to such suit.

3. The amended supplemental complaint fails to state a claim upon which relief can be granted.

4. The amended supplemental complaint does not state a case of which this Court should entertain jurisdiction in that the various provisions of Virginia law to which reference is made in the amended supplemental complaint have not been finally construed by the Supreme Court of Appeals of Virginia. As the constitutional issues presented by the amended supplemental complaint may be modified or removed if the provisions of law in question are first construed by the courts of the Commonwealth of Virginia, the amended supplemental complaint does not state a case of which a federal court should assume jurisdiction.

5. The amended supplemental complaint seeks to enjoin the enforcement, operation and execution of various statutes of the Commonwealth of Virginia upon the ground of the unconstitutionality of such statutes, and the requested relief may not be granted unless the application therefor is heard and determined by a district court of three judges in accordance with 28 U.S.C.A. 2284.

[fol. 128] 6. No actual controversy exists between the parties to this suit, nor is there any present clash of contending legal interests between the parties.

Woodrow W. Wilkerson, Superintendent of Public Instruction;

Colgate W. Darden, Lewis F. Powell, Jr., Gladys V. V. Morton, William J. Story, Jr., Leonard G. Muse, Louise F. Galleher, Mosby Garland Perrow, Jr., Individually and Constituting the State Board of Education,

By: ....., Of Counsel.

Frederick T. Gray, Attorney General of Virginia;
R. D. McIlwaine, III, Assistant Attorney General, Supreme Court—State Library Building, Richmond 19, Virginia.

Certificate of service (omitted in printing).

[fol. 129]

IN UNITED STATES DISTRICT COURT

MOTION OF DEFENDANTS TO DISMISS OR IN THE ALTERNATIVE TO ABSTAIN FROM DETERMINING THE ISSUES PRESENTED IN THE AMENDED SUPPLEMENTAL COMPLAINT AND TO DISMISS PLAINTIFFS' MOTION FOR FURTHER RELIEF—Filed May 1, 1962.

Now come all defendants herein, to-wit: County School Board of Prince Edward County, Virginia; T. J. McIlwaine, Division Superintendent of Public Schools; Board

of Supervisors of Prince Edward County; J. W. Wilson, Jr., Treasurer of said County; the individual members of the said State Board of Education; and Woodrow W. Wilkerson, Superintendent of Public Instruction, and without waiving their several motions heretofore filed which remain undetermined, but severally renewing and insisting upon the same, move the Court as follows:

1. To dismiss the Amended Supplemental Complaint and Motion of Plaintiffs for Further Relief, or in the alternative to abstain from exercising jurisdiction over the same until the Supreme Court of Appeals of Virginia has had submitted to it and has had opportunity to decide the question set forth in this Court's opinion of August 23, 1961, and in its order of November 16, 1961.

2. As their grounds for said motion, defendants recite the following sequence of events:

A. In recognition of the Federal doctrine of abstention, this Court, in its memorandum opinion of August 23, 1961, said that:

> "The question that must and should be judicially determined is: Can the public schools, heretofore maintained in Prince Edward County, be closed in order to avoid the racial discrimination prohibited by the Fourteenth Amendment?"

[fol. 130] It further said:

> "Counsel for all parties having indicated that an appropriate suit would be forthwith instituted in the Virginia state courts, this Court will defer its ruling on this question until the Supreme Court of Appeals of Virginia has rendered its decision, provided that said suit is filed within sixty days from this date."

B. Within two and one-half weeks thereafter, to-wit, on September 8, 1961, Leslie Francis Griffin, Jr., an infant by L. F. Griffin, Sr., his father and next friend, and L. F. Griffin, Sr., two of the persons who are party plaintiffs in the instant case, acting through counsel who represent the

plaintiffs in the instant case, filed a petition for mandamus in the Supreme Court of Appeals of Virginia against the Board of Supervisors of Prince Edward County. The proceeding thereby instituted is hereinafter referred to as "the mandamus proceeding." In the mandamus proceeding the petitioners alleged, among other things, that by reason of Article IX of the Constitution of Virginia, and particularly Sections 129 and 136 thereof, and the several statutes which have been enacted pursuant thereto, it was the duty of the Board of Supervisors to appropriate money to be used by the County School Board for the maintenance and operation of public free schools within the County; and they also alleged that the failure so to appropriate funds was due to reaction to the opinion of the United States Court of Appeals for the Fourth Circuit in the instant case of May 5, 1959, and for no reason other than a determination not to appropriate money for the operation and maintenance of public schools wherein the races are taught together and the fact that by virtue of the opinions, orders and decrees entered in the instant case the School Board of the County would be required to permit children of [fol. 131] both races to be taught together in the public schools of the County. The prayer of the petition was that the Board of Supervisors be directed to appropriate and make available to the County School Board sufficient funds with which to operate and maintain such public schools as in the judgment of the School Board might be required, all of which will more fully appear from a copy of said petition found on page 5 of the printed Record in the mandamus proceeding, a copy of which Record is filed herewith and marked Exhibit "A." A copy of the petitioners' opening brief in the mandamus proceeding is filed herewith and marked Exhibit "B."

C. The Board of Supervisors of said County answered said petition as is shown by their answer appearing on page 8 *et seq.*, of said Record filed herein as Exhibit "A." Amid other things, they alleged that their acts did no violence to the Constitution of Virginia or the Constitution of the United States.

D. The pleadings in the mandamus proceeding having been brought to the attention of this Court, this Court in its order of November 16, 1961, recited:

> "It appearing from statement of counsel and the copy of the suit papers that an appropriate suit has been timely instituted in the Supreme Court of Appeals of Virginia, seeking a determination of the legal question posed in this Court's opinion of August 23, 1961, namely: 'Can the public schools, heretofore maintained in Prince Edward County, be closed in order to avoid the racial discrimination prohibited by the 14th Amendment?' "

[fol. 132] And this Court then determined:

> "The Court reserves further consideration of this question until there has been a final determination by the Supreme Court of Appeals of Virginia of the pertinent provisions of the United States Constitution, the Virginia Constitution and statutes adopted pursuant thereto."

E. The brief filed on behalf of the Board of Supervisors of Prince Edward County in the mandamus proceeding dealt extensively not only with the questions of State law but also with the questions of Federal law and whether the actions of the Board of Supervisors violated the Federal Constitution. A copy of said brief is filed herewith as Exhibit "C", and particular reference is made to pages 64-124 thereof.

F. Despite the terms of this Court's abstention order entered on November 16, 1961, the plaintiffs in the mandamus proceeding filed a reply brief in the mandamus proceeding on December 24, 1961, a copy of which is filed herewith marked Exhibit "D", in which they disclaimed the existence of a Federal question in the mandamus proceeding. The said brief contains a Section VI, beginning on page 20 thereof, the caption of which is "The Pleadings in This Case Present No Federal Question," and in which they asserted that not only were there no Federal questions involved in the mandamus proceeding but that this Court had:

"... abstained from decision of that question [i.e., the Federal question] pending this Court's [i.e., the Virginia Court's] determination whether *the Constitution and laws of Virginia* permit the respondent here, by withholding funds, to require public schools to be and to remain closed." (Emphasis added).

[fol. 133] No mention is made of the fact that the Federal Court was also awaiting the Virginia Court's determination of the questions arising under the Federal Constitution.

G. The plaintiffs in said mandamus proceeding having thus affirmatively disclaimed the submission of any Federal question to the Supreme Court of Appeals of Virginia and having thus removed any Federal question from the consideration of said Court, the Supreme Court of Appeals of Virginia, in its opinion handed down March 5, 1962, a copy of which is filed herewith and marked Exhibit "E", said:

"The petitioners further point out in their brief that 'there are no Federal questions [involved] in this proceeding,' and we perceive none."

H. Accordingly, the plaintiffs, with knowledge gained from this Court's order of November 16, 1961, that this Court was anticipating from the case then pending in the Supreme Court of Appeals of Virginia a "final determination by the Supreme Court of Appeals of Virginia of the pertinent provisions of the United States Constitution" and with knowledge, gained from the answer and brief of defendant filed in said case, that the defendant was seeking such determination, nevertheless by their subsequent action of December 24, 1961, frustrated and prevented such determination of the Supreme Court of Appeals of Virginia, thereby failing to comply with this Court's order of abstention. That the plaintiffs were aware of the full scope of the questions which this Court desired to have decided in the Supreme Court of Appeals of Virginia is made manifest by paragraph 3 of the "Motion For Further Relief."

For the foregoing reasons, the Amended Supplemental [fol. 134] Complaint and the Motion for Further Relief should be dismissed, or at least all further proceedings in this instant case should be stayed and the plaintiffs directed to submit to the Supreme Court of Appeals the question whether the actions of the Board of Supervisors as outlined in said petition for mandamus violates any provisions of the Constitution of the United States, and in the event of the failure of the plaintiffs so to submit said question within a reasonable time fixed by the Court, the said Amended Supplemental Complaint and Motion for Further Relief should be dismissed.

County School Board of Prince Edward County, Virginia, and T. J. McIlwaine, Division Superintendent of Public Schools,

By: ....., Of Counsel.

Board of Supervisors of Prince Edward County and J. W. Wilson, Jr., Treasurer of said County,

By: ....., Of Counsel.

Members of the State Board of Education and Woodrow W. Wilkerson, Superintendent of Public Instruction,

By: ....., Of Counsel.

[fol. 135] Collins Denny, Jr., John F. Kay, Jr., Denny Valentine & Davenport, 1300 Travelers Building, Richmond 19, Virginia;

C. F. Hicks, DeHardit, Martin & Hicks, Gloucester, Virginia, Counsel for County School Board of Prince Edward County, Virginia, and T. J. McIlwaine, Division Superintendent of Public Schools;

J. Segar Gravatt, Blackstone, Virginia;

Frank N. Watkins, Watkins and Brock, Farmville, Virginia, Counsel for Board of Supervisors of Prince Edward County, and J. W. Wilson, Jr., Treasurer of said County;

Robert Y. Button, Attorney General of Virginia;

R. D. McIlwaine, III, Assistant Attorney General, Supreme Court—State Library Building, Richmond 19, Virginia;

Frederick T. Gray, Special Assistant, State-Planters Bank Building, Richmond 19, Virginia, Counsel for Members of the State Board of Education and Woodrow W. Wilkerson, Superintendent of Public Instruction.

[fol. 136] Certificate of service (omitted in printing).

IN UNITED STATES DISTRICT COURT

MOTION FOR FURTHER RELIEF—Filed March 26, 1962

Now come the plaintiffs in the above-entitled cause and move this Court for further relief and for final disposition of this case and in support thereof show:

1. On November 16, 1961, this Court entered its order enjoining the defendants from processing or approving any application for state scholarship grants from persons residing in Prince Edward County, and from approving and paying out any county funds and allowing of tax credits authorized by the so-called Grant-in-Aid ordinance or the Tax credit ordinance of July 18, 1960, during such time as the public schools in Prince Edward County remain closed.

2. It was further ordered that defendant, the School Board of Prince Edward County, comply with the April 22, 1960, order of the Court requiring the aforesaid defendant to make plans for the admission of pupils of the elementary schools of Prince Edward County without regard to race or color.

3. The question as to whether the public schools could be closed in order to avoid compliance with the guarantees [fol. 137] of the Fourteenth Amendment prohibiting racial discrimination was reserved for further consideration until there had been a final determination by the Supreme Court of Appeals of Virginia of the "pertinent provisions of the United States Constitution, the Virginia Constitution and the statutes adopted pursuant thereto."

4. Prior to the above cited order of this Court, plaintiffs filed an original petition for writ of mandamus in the Supreme Court of Appeals requesting that Court to determine whether Article IX of the Constitution of Virginia, and particularly Sections 129 and 136 thereof, imposes a mandatory duty upon the defendant, the Board of Supervisors of Prince Edward County, to appropriate sufficient funds for the use of the County School Board to maintain and operate such free public schools in Prince Edward County as the public welfare may require.

5. On March 5, 1962, that court ruled that the Constitution and the laws of the Commonwealth of Virginia placed a discretionary, not mandatory, duty on the defendant, Board of Supervisors of Prince Edward County, to appropriate sufficient funds to maintain free public schools in the county. Since this duty was not mandatory, the failure of the Board to appropriate any funds to maintain the schools in Prince Edward County was declared not to be subject to judicial relief.

6. The injunctive decrees and order entered by this Court on November 16, 1961, by their terms are to become inoperative twenty (20) days from the date of the entry of the judgment and order of the Supreme Court of Appeals, which would leave defendants free to appropriate state scholarship grants, grants-in-aid and tax credit to support and provide funds for persons to attend the Prince [fol. 138] Edward School Foundation in the absence of public schools being maintained in the county and contrary to the intendment of this Court in both its memorandum opinion and judgment.

7. The state law questions as to the duties of the defendants having been determined by the Supreme Court of Appeals, this Court must now decide the federal constitutional issues in the light of that state law determination, to wit:

(a) Whether the failure of the Board of Supervisors of Prince Edward County to exercise its discretionary obligations under Article IX of the Constitution of Virginia

and to appropriate and provide funds sufficient to maintain an efficient free public school system in Prince Edward County constitutes a violation of the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States?

(b) Whether such failure to appropriate funds to maintain a free public school system in order to avoid the maintenance and support of public schools free of racial discrimination as required by the federal Constitution and the decisions and mandate of this Court constitutes a denial of equal protection of the laws and due process of law as secured by the Fourteenth Amendment to the Constitution of the United States?

(c) In the light of the determination of the Supreme Court of Appeals that the Board of Supervisors is under a discretionary and judicially unenforceable duty to appropriate sufficient funds to maintain a free public school system in Prince Edward County, does the failure of the Commonwealth of Virginia to provide out of state funds whatever monies are necessary for the maintenance of an efficient free public school system in Prince Edward County constitute a denial of equal protection and due process of [fol. 139] law as secured by the Fourteenth Amendment to the Constitution of the United States?

(d) The Commonwealth of Virginia, pursuant to Article IX of the Constitution of Virginia and Title 22, Code of Virginia, 1950, as amended, has established a procedure and formula for a state wide operation and maintenance of free public schools in Virginia. Only in Prince Edward County is this formula and procedure not being effectuated. Does the failure, therefore, to effectuate and to implement the formula and procedure for maintenance of an efficient public school system in Prince Edward County, as provided in Article IX of the Constitution of Virginia, and Title 22, Code of Virginia, 1950, as amended, constitute a denial of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States?

(e) Does the failure effectuate the procedure and formula aforesaid for the maintenance and operation of free

public schools in Prince Edward County, in the light of the notorious and well-known fact that this formula and procedure are not being followed in Prince Edward County for the sole reason that local authorities are seeking to avoid compliance with the Fourteenth Amendment guarantee against racial discrimination, constitute a denial of the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States?

8. It is plaintiffs' contention that the facts and the law require that this Court answer each of the above-cited questions in the affirmative and hold that the failure of the defendant Board of Supervisors to appropriate funds sufficient for free public schools, and the failure of the Commonwealth to provide free public schools, and the failure of the Commonwealth to effectuate the formula and procedure for the operation of the free public schools in Prince [fol. 140] Edward County constitute denials of equal protection and due process as secured under the Fourteenth Amendment to the Constitution of the United States and, therefore, that this Court should, after hearing, grant further and final relief to the plaintiffs, to wit:

(a) Enjoin the defendant Board of Supervisors from refusing to appropriate sufficient funds to maintain and operate an efficient public school system in Prince Edward County on the grounds that such failure constitutes a denial of equal protection and due process; or

(b) Enjoin the Commonwealth of Virginia from refusing to provide sufficient funds for the operation of the free public school system in Prince Edward County, in the light of the Board of Supervisors' failure to do so on the grounds that the state's failure to maintain a free public school system in the County constitutes a denial of due process and equal protection guaranties of the Fourteenth Amendment.

(c) Enjoin the Commonwealth of Virginia; the State Board of Education; the County School Board of Prince Edward County; T. J. McIlwaine, Division Superintendent of Schools of Prince Edward County; the Board of Super-

visors of Prince Edward County; J. W. Wilson, Jr., Treasurer of Prince Edward County; Woodrow W. Wilkerson, Superintendent of Public Instruction; Garland Gray, Lewis F. Powell, Jr., Anne Dobie Peebles, C. Stuart Wheatley, Jr., Leonard G. Muse, Louise F. Galleher and Mosby Garland Perrow, Jr., individually and as constituting the State Board of Education; and all other persons who may be concerned, as well as their assigns, successors in office and persons in concert with them from failing and refusing to implement and effectuate in Prince Edward County the provisions of Article IX of the Constitution of Virginia and [fol. 141] Title 22, Code of Virginia, 1950, as amended, establishing the state-wide procedure and formula for the maintenance and operation of free public schools in Virginia, on the ground that the failure to implement and effectuate these provisions as aforesaid constitutes a denial of equal protection and due process as secured by the Fourteenth Amendment to the Constitution of the United States.

(d) Make final and permanent the injunctive decrees heretofore entered against the defendants in the November 16, 1961, order of this Court.

9. Plaintiffs request a speedy hearing and early determination of the questions and issues herein raised.

Respectfully submitted,

S. W. Tucker, Of Counsel for Plaintiffs.

Robert L. Carter, 20 West 40th Street, New York 18, New York;

S. W. Tucker, Henry L. Marsh, III, 214 East Clay Street, Richmond 19, Virginia;

Otto L. Tucker, 901 Princess Street, Alexandria, Virginia, Attorneys for Plaintiffs.

Certificate of service (omitted in printing).

[fol. 143] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Civil Action No. 1333

EVA ALLEN, et al., Plaintiffs,

v.

PRINCE EDWARD COUNTY SCHOOL BOARD, et al., Defendants.

UNITED STATES, Applicant for Intervention.

MOTION TO INTERVENE AS A PLAINTIFF AND TO ADD DEFENDANTS—Filed April 26, 1961

The United States, by Robert F. Kennedy, Attorney General, and Joseph S. Bambacus, United States Attorney for the Eastern District of Virginia, moves for leave to intervene as a plaintiff in this action and to file the complaint in intervention, a copy of which is attached hereto, and to add as parties defendant the persons and corporations named as additional defendants in the complaint in intervention.

As appears from the complaint in intervention, intervention by the United States, and the adding of the persons and corporations named in the complaint in intervention as parties defendant, is necessary in order to prevent the circumvention and nullification of the prior orders of this Court and to safeguard the due administration of justice and the integrity of the judicial processes of the United States.

[fol. 144] The claim of the United States, as set forth in the complaint in intervention, involves questions of both law and fact in common with those raised by the amended supplemental complaint filed by the plaintiffs herein.

This motion is made under and pursuant to Sections 309 and 316 of Title 5 of the United States Code and Rule 24 of the Rules of Civil Procedure.

Robert F. Kennedy, Attorney General;

Burke Marshall, Assistant Attorney General;

Joseph S. Bambacus, United States Attorney.

[fol. 145] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Civil Action No. 1333

EVA ALLEN, et al., Plaintiffs,

v.

PRINCE EDWARD COUNTY SCHOOL BOARD, et al., Defendants.

UNITED STATES, Applicant for Intervention.

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION OF THE UNITED STATES OF AMERICA
TO INTERVENE AND TO ADD PARTIES DEFENDANT
—Filed April 26, 1961

I.

The District Courts of the United States have jurisdiction to enjoin interference with and obstruction to the implementation of their orders requiring operation of public schools on a racially non-discriminatory basis.

Faubus v. *United States*, 254 F. 2d 797 (C.A. 8, 1958), cert. den. 358 U.S. 829;

Kasper v. *Brittain*, 245 F. 2d 92 (C.A. 6, 1957), cert. den. 355 U.S. 834;

Bullock v. *United States*, 265 F. 2d 683 (C.A. 6, 1959), cert. den. 360 U.S. 932;

Kelley v. *Board of Education of the City of Nashville*, 2 R.R.L.R. 976-983 (D.C. M.D. Tenn., 1957).

[fol. 146] II.

Obstruction to and circumvention of school desegregation decrees violate the interests of the United States in the due administration of justice as well as the interest of the original plaintiffs in the desegregation suit.

Faubus v. *United States, supra;*

Bush v. *Orleans Parish School Board*, 190 F. Supp. 861 (D.C. E.D. La., Nov. 30, 1960);

Bush v. *Orleans Parish School Board*, —— F. Supp. —— (D.D. E.D. La., Mar. 3, 1961).

III.

The United States, in its sovereign capacity, may seek relief in its courts against the violation of such interest.

In re Debs, 158 U.S. 564, 584;

United States v. *California*, 322 U.S. 19;

Sanitary District of Chicago v. *United States*, 266 U.S. 405, 425-6;

Kern River Company v. *United States*, 257 U.S. 147, 154-5;

United States v. *San Jacinto Tin Company*, 125 U.S. 273, 278-80, 248-51;

United States v. *Louisiana, sub nom. Bush* v. *Orleans Parish School Board*, 188 F. Supp. 916 (D.C. E.D. La., Nov. 30, 1960);

Faubus v. *United States, supra;*

Bush v. *Orleans Parish School Board* (Mar. 3, 1961), *supra.*

IV.

The closing of public schools to avoid compliance with a desegregation decree while schools elsewhere in the state remain open is an unlawful obstruction to the carrying out of such decree, and the diversion of state funds from the [fol. 147] closed schools to privately operated segregated schools is an unlawful circumvention of such decree.

James v. *Almond*, 170 F. Supp. 331 (D.C. E.D. Va., 1959), appeal dismissed 359 U.S. 1006;

James v. *Duckworth*, 170 F. Supp. 342 (D.C. E.D. Va., 1959);

Aaron v. *McKinley*, 173 F. Supp. 944 (D.C. E.D. Ark., 1959), aff'd. *sub nom. Faubus* v. *Aaron*, 361 U.S. 197;

And see *Brown* v. *Board of Education*, 347 U.S. 483 (1954) at p. 493;

Bush v. *Orleans Parish School Board*, 188 F. Supp. 916, 928 (D.C. E.D. La., 1960).

V.

The United States having a claim for relief against unlawful obstruction and circumvention of this Court's prior decrees, and the claim having questions of law and fact in common with those raised by the plaintiffs' amended supplemental complaint, the motion to intervene should be granted.

5 U. S. C. 309;

5 U. S. C. 316;

Rule 24, Rules of Civil Procedure;

And see *Securities & Exchange Commission* v. *United States Realty & Improvement Co.*, 310 U.S. 434.

Burke Marshall, Assistant Attorney General;

Joseph S. Bambacus, United States Attorney;

St. John Barrett, Department of Justice.

[fol. 148]

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

Civil Action No. 1333

EVA ALLEN, et al., Plaintiffs,

v.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, VIRGINIA, et al., Defendants.

UNITED STATES OF AMERICA, Intervenor,

v.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY; T. J. McILWAINE, Division Superintendent of Schools of Prince Edward County; BOARD OF SUPERVISORS OF PRINCE EDWARD COUNTY; J. W. WILSON, JR., Treasurer of Prince Edward County; PRINCE EDWARD SCHOOL FOUNDATION, a Corporation; THE COMMONWEALTH OF VIRGINIA; WOODROW W. WILKERSON, State Superintendent of Public Instruction of Virginia; COLGATE W. DARDEN, LEWIS F. POWELL, JR., GLADYS V. V. MARTIN, WILLIAM F. STORY, JR., LEONARD G. MUSE, LOUISE F. GALLEHER and MOSBY GARLAND PERROW, JR., members of the State Board of Education of Virginia, and SYDNEY C. DAY, Comptroller of Virginia, Defendants.

COMPLAINT IN INTERVENTION

The United States, as a claim against the defendants, alleges that:

1. This proceeding is brought against the County School Board of Prince Edward County (hereafter referred to [fol. 149] as the County School Board; T. J. McIlwaine, Division Superintendent of Schools of Prince Edward

County; the Board of Supervisors of Prince Edward County (hereafter referred to as the Board of Supervisors); J. W. Wilson, Jr., Treasurer of Prince Edward County; Colgate W. Darden, Lewis F. Powell, Jr., Gladys V. V. Martin, William F. Story, Jr., Leonard G. Muse, Louise F. Galleher and Mosby Garland Perrow, Jr., members of the State Board of Education of Virginia, and Woodrow W. Wilkerson, Superintendent of Public Instruction of Virginia, each of whom has been previously named and served as a defendant in this case.

2. This proceeding is also brought against the Commonwealth of Virginia (hereafter referred to as the State), the Prince Edward School Foundation, a corporation (hereafter referred to as the Foundation), and Sydney C. Day, Jr., Comptroller of Virginia.

3. The Commonwealth of Virginia is a state of the United States. Its principal executive and legislative offices are located in Richmond, Virginia.

4. Sydney C. Day, Jr., is Comptroller of Virginia, and as such is authorized under the laws of Virginia to draw warrants upon the state treasury for the disbursement of state funds for school and educational purposes. He resides in Richmond, Virginia.

5. The Prince Edward School Foundation is a corporation organized and existing under the laws of Virginia. Its office and principal place of business is in Prince Edward County, Virginia.

6. Section 129 of the constitution of Virginia requires that the General Assembly establish and maintain a system of public free schools throughout the state. In dis- [fol. 150] charge of this responsibility the General Assembly has enacted legislation, appearing in Title 22 of the Code of Virginia, providing for such a system.

7. At all times herein mentioned prior to June 1959, the County School Board, the Division Superintendent, the Board of Supervisors, the State, the State Board of Education and the State Superintendent of Public Instruction maintained a system of public free schools in Prince Ed-

ward County. This system of schools provided public education at the elementary and high school levels for approximately 3100 pupils, of whom approximately 1700 were Negro and 1400 white. Separate schools were maintained for the white and Negro races.

8. On May 17, 1954, the Supreme Court of the United States reversed the judgment of this Court entered in this case on March 7, 1952, and held that state operation of racially segregated schools in Prince Edward County was a denial of the equal protection of the laws secured by the Fourteenth Amendment to the Constitution.

9. In July 1954 the Board of Supervisors of Prince Edward County adopted a resolution expressing opposition to the operation of racially non-segregated public schools.

10. On July 18, 1955, this Court, having received the mandate of the Supreme Court in this case, entered its order requiring that the public schools of Prince Edward County be racially desegregated with all deliberate speed.

11. On May 3, 1956, the Board of Supervisors held a public meeting in which they received and directed to be filed with the records of the Board a petition signed by [fol. 151] approximately 4000 white citizens of Prince Edward County stating that they preferred to abandon public schools rather than to have the children of the county educated on a racially non-segregated basis. At the meeting the Board of Supervisors adopted a resolution declaring it to be the policy of the Board that no county tax levy should be made for the operation of public schools on a racially non-segregated basis. At the meeting those in attendance adopted a "declaration of conviction" asking the Board of Supervisors to enact ordinances and regulations to prohibit the levying of any tax or the appropriation of any funds for the operation of "racially-mixed schools within Prince Edward County to the end that all public schools of the county may be closed upon the entry of a court order requiring the mixing of the races in any school of this county." This declaration was

received by the Board of Supervisors and filed with the records of the Board. Copies of the affirmation, resolutions and declaration of convictions are attached hereto as Appendix A.

12. On May 5, 1959, the Court of Appeals for the Fourth Circuit reversed an order entered by this Court on August 4, 1958, and directed the entry of an order requiring that the public high schools of Prince Edward County be operated on a racially non-discriminatory basis commencing with the fall semester, 1959.

13. On May 26, 1959, William F. Watkins, Jr., W. J. Gills, Jr., and J. Barrye Wall, Jr., each a resident of Prince Edward County, executed articles of incorporation for the Prince Edward School Foundation for the purpose of operating, through the instrumentality of the Foundation, elementary and high schools in Prince Ed- [fol. 152] ward County for the education of children of the white race, exclusively.

14. On May 29, 1959, the State Corporation Commission of Virginia issued a certificate of incorporation to the Prince Edward School Foundation to operate nonprofit private schools in Prince Edward County, Virginia.

15. On June 2, 1959, the Board of Supervisors adopted a resolution that the Board would levy no taxes for the operation of public schools in Prince Edward County for the 1959-60 school year. In connection with this resolution the Board of Supervisors, through its chairman, issued a formal statement that it was not possible to operate the public schools of Prince Edward County within the terms of the order of this Court.

16. On June 3, 1959, the Board of Supervisors voted its approval of a county budget making no provision for operation of public schools. The Board fixed the tax levy for the fiscal year 1959-60 at $1.60 per one hundred dollars of assessed valuation on all taxable property located outside of Farmville, at $1.50 for all property located in Farmville other than personal property classified as merchants' capital invested in the county, and $0.30 upon all

such merchants' capital. The corresponding levies upon these categories of property had been, in both 1957 and 1958, $3.40, $3.30, and $0.80, respectively.

17. Public schools in Prince Edward County were not opened for the fall semester 1959 and have not been open since that time.

18. In September 1959 the Prince Edward School Foundation employed teachers and offered courses of [fol. 153] instruction for white children residing in Prince Edward County. Approximately 1400 white children, comprising virtually the entire white population of school age in Prince Edward County, were enrolled by the Foundation. No tuition or other fees were exacted for the instruction of these students.

19. The Prince Edward School Foundation employed for the school year 1959-1960, and is now employing, approximately fifty-nine of the seventy white teachers who had been employed by the County School Board the preceding year and who had taught in the public schools.

20. The Prince Edward School Foundation financed the operation of schools for white children during the 1959-60 school year through contributions. In soliciting contributions the Foundation urged property owners to donate sums saved by them on account of the reduction in tax levies for the fiscal year 1959-60 as described in paragraph 16.

21. On April 22, 1960, this Court, on remand from the decision of the Court of Appeals of May 5, 1959, entered an order enjoining the County School Board and the Division Superintendent from any action that regulates or affects on the basis of race or color the admission, enrollment or education of Negro children to the public high schools of the county and requiring the County School Board and the Division Superintendent to make plans for the admission of pupils in the elementary schools of the county without regard to race or color, and to receive and consider applications to that end at the earliest practical day.

22. In June 1960 the Board of Supervisors adopted a county budget for fiscal 1960-61 providing approximately [fol. 154] $270,000 for educational purposes, but without providing funds to permit operation of the public schools. On the basis of this budget the Board of Supervisors fixed the tax levy for the fiscal year 1960-61 at $4.00 per one hundred dollars of assessed valuation on all taxable property outside Farmville, at $3.90 for all property located in Farmville other than personal property classified as merchants' capital invested in the county, and $0.80 upon all such merchants' capital.

23. On July 18, 1960, the Board of Supervisors, acting under authority of Sec. 19.1 of Title 58 of the Code of Virginia, adopted an ordinance requiring the County Treasurer to allow as a credit against real and personal property taxes due the county any contributions, not in excess of 25 per cent of the amount of the taxes due, made by a taxpayer to any non-profit, non-sectarian private school located within Prince Edward County. The text of this ordinance is attached hereto as Appendix B.

24. On July 18, 1960, the Board of Supervisors, acting under authority of Chapter 7.3 of Title 22 of the Code of Virginia, adopted an ordinance providing for grants of county funds to parents of children between the ages of six and twenty years, residing in Prince Edward County, who enrolled in private non-sectarian elementary or secondary schools within the county, or in public schools within the State of Virginia. The ordinance provides that each grant shall be not less than $100 per year for each child. The text of this ordinance is attached hereto as Appendix C.

25. The only private, non-sectarian elementary or sec- [fol. 155] ondary schools operating in Prince Edward County on July 18, 1960, or which have been established and operating since that time, attendance at which qualifies a student to a tuition grant under the Board of Supervisors ordinance referred to in the preceding paragraph, are the schools of the Prince Edward School Foundation.

26. Taxpayers of Prince Edward County have, since the adoption of the ordinance referred to in paragraph 23, claimed $58,866 in tax credits on account of contributions to the Prince Edward School Foundation.

27. The Foundation has 1376 white children enrolled for the 1960-1961 school year.

28. The Foundation has financed and is financing its educational program for the 1960-1961 school year by charging tuition in the amount of $240 for each child enrolled in elementary schools and $265 for each child enrolled in high school, as well as by contributions.

29. Of the $240 in tuition paid to the Foundation for each elementary school student, $100 has been or is being reimbursed to the parent or guardian by Prince Edward County pursuant to the ordinance of the Board of Supervisors described in paragraph 24, and $125 has been or is being reimbursed by the State pursuant to the provisions of the Code of Virginia, Title 22, Chapter 7.3, Article 1. Of the $265 in tuition paid to the Foundation for each high school student, $100 has been or is being reimbursed by Prince Edward County pursuant to the ordinance of the Board of Supervisors described in paragraph 24, and $150 has been or is being reimbursed by the State pursuant to the provisions of the Code of Virginia, Title 22, Chapter 7.3, Article 1.

[fol. 156] 30. The County School Board has been and is receiving and processing applications for reimbursement of tuition as described in the preceding paragraph. For the 1960-61 school year, the County School Board has received and approved 1,325 applications by white children attending the schools of the Prince Edward School Foundation. It has approved no other applications for tuition grants for attendance in "non-sectarian private" schools.

31. On December 6, 1960, a number of Negro residents of Prince Edward County presented a signed petition to the Board of Supervisors asking that the public schools of the county be reopened. This request was rejected by the Board of Supervisors.

32. Since June 1959 the County School Board, the Division Superintendent, the Board of Supervisors, the State, the State Board of Education and the State Superintendent of Public Instruction have failed and refused to maintain a system of public free schools in Prince Edward County. The purpose and effect of this failure and refusal has been and is to prevent the operation of public schools in Prince Edward County in compliance with the orders of this Court requiring their operation on a racially nondiscriminatory basis.

33. Since June 1959 the County School Board, the Board of Supervisors, the State, the State Board of Education and the State Superintendent of Public Instruction have maintained the schools of the Prince Edward School Foundation for the education of white children residing in Prince Edward County.

34. Since June 1959 no schools have been maintained and operated in Prince Edward County for the education [fol. 157] of Negro children residing in the county.

35. A system of public free schools is being maintained by the State, the State Board of Education and the State Superintendent of Public Instruction in all counties and cities of the State other than Prince Edward County, and warrants for payment of state funds in connection with the maintenance of such system have been and are being drawn upon the state treasury by the Comptroller.

36. The maintenance and operation of the schools of the Prince Edward School Foundation on a racially discriminatory basis, with the financial assistance of the county and State, circumvents this Court's order requiring the public schools of Prince Edward County to be operated without racial discrimination.

37. The failure and refusal of the County School Board, the Division Superintendent, the Board of Supervisors, the State, the State Board of Education and the State Superintendent of Public Instruction to maintain and operate a system of public free schools in Prince Edward County, while such a system is being maintained and operated

throughout the rest of the state, denies to Negro residents and taxpayers of the county rights secured by the Fourteenth Amendment to the Constitution.

38. Plaintiff, having the duty to represent the public interest in the administration of justice and the preservation of the integrity of the processes of this Court, has no remedy against the unconstitutional and illegal acts of the defendants herein named, other than this action for an injunction, and unless such injunction issue the plaintiff will [fol. 158] suffer immediate and irreparable injury consisting of the impairment of the integrity of the judicial process, the obstruction of the due administration of justice, and the deprivation of rights under the Constitution and laws of the United States.

Wherefore, Plaintiff respectfully prays that this Court enter an order:

(a) enjoining the County School Board, the Division Superintendent, the Board of Supervisors, the State, the State Board of Education, and the State Superintendent of Public Instruction from failing or refusing to maintain in Prince Edward County a system of public free schools;

(b) enjoining the County School Board, the Board of Supervisors, the State, the State Board of Education, the State Superintendent of Public Instruction, and the State Comptroller from approving, paying, or issuing warrants for the payment of tuition grants for students attending the Prince Edward School Foundation, for so long and during such period as the public schools of Prince Edward County are closed and a system of public free education is not maintained in Prince Edward County;

(c) enjoining the Board of Supervisors and the County Treasurer from allowing any credit to taxpayers on account of contributions to the Prince Edward School Foundation for so long and during such period as the public schools of Prince Edward County [fol. 159] are closed and a system of public free education is not maintained within the county;

(d) enjoining the State, the State Board of Education, the State Superintendent of Public Instruction, and the State Comptroller from approving, paying, or issuing warrants for the payment of any funds of the State for the maintenance or operation of public schools anywhere in Virginia for so long and during such period as the public schools of Prince Edward County are closed and a system of public free schools is not maintained within the County, and

(e) enjoining all of the defendants from otherwise interfering with, obstructing, or circumventing the orders of this Court requiring operation of the public schools of Prince Edward County on a racially nondiscriminatory basis.

Plaintiff further prays that the Court grant such additional relief as the interests of justice may require.

Robert F. Kennedy, Attorney General; Burke Marshall, Assistant Attorney General; Joseph S. Bambacus, United States Attorney.

[fol. 160]

APPENDIX A TO COMPLAINT IN INTERVENTION

Affirmation

We, the undersigned citizens of Prince Edward County, Va., hereby affirm our conviction that the separation of the races in the public schools of this county is absolutely necessary and do affirm that we prefer to abandon public schools and educate our children in some other way if that be necessary to preserve separation of the races in the schools of this county.

We pledge our support of the Board of Supervisors of Prince Edward County in their firm maintenance of this policy.

Note.—This affirmation has been signed by 4,216 citizens over 21 years of age in the county which is 1,000 more than the total qualified registered voters.

Resolutions

At a regular meeting of the Board of Supervisors of Prince Edward County held at the courthouse thereof, on the 3rd day of May 1956, at which meeting all members of the board were present, the following resolutions were adopted unanimously:

I

Be it resolved by the board of supervisors, That we do hereby express to the people of Prince Edward County our gratitude that they have made known to this board so clearly their views upon the grave problems with which we are confronted with respect to our schools. The support of our people makes the burden of our responsibilities lighter and the course of our future action clearer. We trust the people of the county will continue to make known to us their views as we go forward to meet our problems together.

II

Be it resolved, That the Board of Supervisors of Prince Edward County as the elected representatives of the people of Prince Edward County, do hereby declare it to be the policy and intention of said board in accordance with the will of the people of said county that no tax levy shall be made upon the said people nor public revenue derived from local taxes shall be appropriated for the operation and maintenance of public schools in said county wherein white and colored children are taught together under any plan or arrangement whatsoever.

III

Be it resolved by the Board of Supervisors of Prince Edward County, That the Governor of Virginia, the superintendent of public instruction, and the State Board of Education are hereby requested to pay any State revenue to the School Board of Prince Edward County in support of public schools in accordance with the policy adopted by

the board of supervisors of said county for the payment of local revenue to said school board.

[fol. 161] IV

Be it further resolved by the Board of Supervisors of Prince Edward County, That the "Affirmation" signed by citizens and school patrons of the county is hereby received and directed to be filed with records of the Board and it is further resolved that the "Statement of Convictions and Purposes" adopted by the citizens of this county present at this meeting (being approximately 250 in number) be received by the board and it is directed that the same be filed with the records of the board.

And the clerk of this board is directed to prepare copies of the affirmation with a statement attached thereto showing the number of the citizens whose names are signed thereto together with copies of the "Statement of Convictions and Purposes" and that one copy of each be transmitted to the School Board of Prince Edward County, the Governor of Virginia, the superintendent of public instruction, the attorney general of Virginia, the State Board of Education, Representative J. H. Daniel and Senator J. D. Hagood, together with a copy of this resolution, and of the resolution this day adopted stating the policy and intention of this board with respect to the levy of taxes and appropriation of local revenue for school purposes.

V

Be it resolved by the Board of Supervisors of Prince Edward County, That the Governor be and he is hereby respectfully requested not to call a special session of the Legislature of Virginia for the purpose of presenting any legislative plan which would require, permit, or authorize under the laws of Virginia the teaching of white and Negro children together in the public schools of Prince Edward County.

Horace Adams, Clerk of the Board.

Declaration of Convictions

(Adopted May 3, 1956, by citizens of Prince Edward County, Va.)

The power of the Federal courts being once again invoked against the administrative officers of our public schools for the purpose of causing children of the white and Negro race to be taught together therein, we the people of Prince Edward County, Va., deem it appropriate that we should make known to all men our convictions and our purposes.

We first affirm our deep and abiding loyalty and devotion to our country and its institutions. We acknowledge the Constitution to be the supreme law of the land and the bulwark of our liberties, ever subject to the sovereign powers reserved by it to the States and to the people. We know that the liberties of all Americans of all races rests upon the Constitution and the division of powers ordained therein. We deem it the obligation of free men to preserve the powers reserved under the Constitution [fol. 162] to the States and to the people and to preserve the constitutional separation of the powers of government in the legislative, executive, and judicial branches separately.

We believe that the educational, social, and cultural welfare and growth of both the white and Negro races is best served by separation of the races in the public schools.

We believe the tranquility, harmony, progress, and advancement of the Negro and the white races, who must live together in Virginia and in Prince Edward County, is absolutely dependent upon the mutual good will and mutual respect of each race for the other.

We believe that a policy which undertakes to force the association of one race with the other against the will of either, by court decree under threat of fine or imprisonment, is destructive of mutual good will and respect, breeds resentment and animosities, and is injurious to the true interests of both races.

Education Parents' Duty

We believe that the molding of the minds and characters of our children is the sacred duty and the priceless natural right and obligation of parents.

Freedom of decision with respect to these considerations touching as they do the most intimate relations of the people of our community and the most cherished natural rights and duties of parenthood is absolutely essential to the maintenance, operation, management, and control of our public schools. We conceive this freedom to be among the sacred rights "retained by the people" under the ninth amendment of the Federal Constitution.

Among the reserved rights and powers of the States guaranteed to the State of Virginia under the 10th Amendment, is the power to maintain racially separate public schools. We do not perceive that the exercise of this power has ever been prohibited to the States by any provision of the Federal Constitution. We believe that this power can be prohibited to the States only by the States themselves. To concede the right of a Federal court to withdraw this power from the individual States is to concede that all rights and powers of the States and of the people are enjoyed at the sufferance of the judiciary and that the guaranties of the liberties of the people are no longer fixed in the Constitution itself.

We do not intend to speak disrespectfully. The gravity of the issues requires that we speak plainly. By its decision of May 17, 1954, and subsequent decisions the Supreme Court of the United States has flagrantly exceeded its lawful and intended authority, trespassed upon the rights of the people and dangerously encroached upon the reserved rights of the States.

Holding these convictions, it is not possible for us to submit the children of Prince Edward County to conditions which we most deeply and conscientiously believe to be pernicious. Nor can we as the heirs of liberty, pur- [fol. 163] chased at so great a sacrifice by those who have gone before, submit to this judicial breaking of the constitutional chains forged to restrain tyranny for all generations of Americans. We, therefore, pledge ourselves

firmly to use every honorable, legal and constitutional means at our command to oppose this assault upon the Constitution and upon the liberties of our people.

Prohibit Funds

Therefore, if courts refuse to recognize these most fundamental, intimate, and sacred rights and the profound necessity that they be respected, then we proclaim our resort to that first American tenet of liberty—that men should not be taxed against their will and without their consent for a purpose to which they are deeply and conscientiously opposed. We ask our board of supervisors as our legislative representatives to proceed at the appropriate time to enact and adopt whatever ordinances and resolutions may be required to prohibit the levying of any tax or the appropriation of any funds for the operation of racially mixed schools within Prince Edward County to the end that all public schools of the county may be closed upon the entry of a court order requiring the mixing of the races in any school of this county.

We further call upon our school board to make known to the district court the determination of the people of Prince Edward County here expressed. The issues are too profound and the consequences to our people too grave to leave any doubt of the impossibility of our compliance or of the resolute mind of our people. An order to mix the races in our schools can only result in the destruction of the opportunity for a public education for all children of this county.

Month-to-Month Basis

We also call upon the Governor of Virginia and all officials of the Commonwealth in control thereof to pay State revenue to Prince Edward County for school purposes in accordance with the policy adopted by the board of supervisors for the payment of local funds for school purposes, thus and thereby giving effect to the interposition resolution of the General Assembly of Virginia, adopted on February 1, 1956, fixing the policy of this Com-

monwealth, "to take all appropriate measures, honorably, legally, and constitutionally available to us, to resist this illegal encroachment upon our sovereign power."

It is with the most profound regret that we have been forced to set this course. The history of the people of Prince Edward County demonstrates their love and appreciation of the value of educational opportunity. We act with no animus toward any man or body of men. We do not act in oppression of the Negro people of this county. We propose, in every way that we can, to preserve every proper constitutional right of all the people of Prince Edward County. However deeply convinced as we are of the wrongness and imprudence of intimate racial integration, we cannot and will not place merely supposed rights, newly created by judicial mandate, above the conscience of our people and above rights and powers, which for [fol. 164] generations have been exercised honorably and constitutionally by the people of our county.

It is our earnest hope that other counties and the Commonwealth of Virginia will repudiate the spurious allurements of expediency and stratagem in order that Virginia may stand as she has always stood, dedicated to the protection of the rights of a free people against tyranny from any quarter. If we fail in this solemn obligation now our rights will be extinguished one by one.

[fol. 165]

APPENDIX B TO COMPLAINT IN INTERVENTION

Be It Ordained by the Board of Supervisors of Prince Edward County, Virginia that:

(1) Contributions made by any person, association, firm, corporation or other taxpayer of the County of Prince Edward, Virginia to a nonprofit, nonsectarian private school located within said County of Prince Edward, Virginia may be deducted from the real and personal property taxes due the County of Prince Edward, Virginia by the person, association, firm, corporation or other taxpayer making such contribution for the year during which said contribution was made, subject to the limitations set forth in this ordinance.

(2) For the purpose of this Ordinance, the term "private school" shall mean only those nonprofit, nonsectarian private elementary and secondary schools either in operation during the year for which the tax deduction or credit is claimed or chartered to begin operation within the year succeeding that for which the tax deduction or credit is claimed, which schools are located in the County of Prince Edward, Virginia and which offer or will offer during the time herein set forth a course of systematic educational instruction of not less than one hundred eighty days duration per school year or the substantial equivalent thereof.

(3) No credit shall be allowed for any contribution made to any private school under the provisions of this ordinance unless the person, association, firm, corporation or other taxpayer seeking such credit files with the Treasurer of the County of Prince Edward, Virginia at the time his, her, or its taxes are due and payable. To wit: On or before December the fifth in the year in which the levy is made, a voucher, receipt or cancelled check showing the amount and date of the contribution and to whom made and his, her, or its affidavit setting forth the name and address of the school to which the contribution was made, the date thereof, the name and address of the person, association, firm, corporation or other taxpayer of the County of Prince Edward, Virginia making such contribution, the amount thereof, and declaring that no scholarship, reduction in fees or charges, rebate or remission of charges or other benefit was granted such person, association, firm, corporation or other taxpayer or his or her children, or any child for which said person, association, firm, corporation or other taxpayer was the legal guardian or other person in loco parentis to such child directly or indirectly as a result of such contribution and declaring that no such refund, rebate, reduction in fees or charges or remission of charges or other benefit will be made to such person, association, firm, corporation or taxpayer on account of such contribution.

Upon the presentation of such affidavit and supporting evidence of payment to the Treasurer of the County of Prince Edward he shall deduct from the amount of taxes

due the County of Prince Edward by such person, firm, association, corporation or other taxpayer on account of real estate taxes or personal property taxes the amount of such contribution, in no event to exceed 25 per centum of the total taxes due the County of Prince Edward on real estate and personal property by such taxpayer. When such person, firm, association, corporation or other taxpayer shall have paid the balance remaining of such taxes due by such person, firm, association, corporation or taxpayer to the County of Prince Edward, Virginia he shall thereupon be discharged from any further liability for taxes assessed against his, her or its personal or real property by the County of Prince Edward, Virginia for the year in which such taxes were payable.

[fol. 166] (4) Upon denial of an application for refund, the Treasurer shall give notice to the applicant of his action within a reasonable time thereafter by mailing said notice to the Post Office address given in the application. Within 15 days after the mailing of said notice any applicant who feels aggrieved by the action of the Treasurer shall file with the Board or its designated agent a petition for a review of this action. Such petition shall state the reasons for his objection to the action of the Treasurer and shall be heard by the Board at its next meeting provided the said meeting is at least 15 days after the filing date of the petition for such hearing. Such hearing shall be informally conducted and the aggrieved party shall have the right to offer evidence and to be represented by counsel.

Within 15 days after such hearing the Board shall notify such aggrieved party of its final action upon such application and any applicant feeling aggrieved thereby shall have the right of appeal to the Circuit Court of the County of Prince Edward as provided by law.

(5) The Treasurer of Prince Edward County shall in no case be liable upon his bond or otherwise for any credit granted any person, firm, corporation, association or other taxpayer under this Ordinance provided the voucher, receipt or cancelled check and the affidavit required by this Ordinance executed by the person, firm, association or other taxpayer are filed with the Treasurer as herein required.

(6) It shall be unlawful and constitute a misdemeanor for any person falsely to claim a credit or seek to falsely claim a credit for a contribution as a credit against his taxes not in accordance with the provisions of this Ordinance. Any person violating this Ordinance shall be subject to a fine not exceeding $300.00 or confinement in jail not exceeding thirty days.

(7) If any part, section, portion or provision of this Ordinance or the application thereof to any person or circumstance be held invalid by a court of final resort, such holding shall not affect any part, section, portion, provision or application of this Ordinance which can be given effect without the part, section, portion, provision or application so held invalid; and to this end, the parts, sections, portions, provisions and applications hereof are declared severable.

(8) This Ordinance is passed pursuant to Chapter 191 of Acts of General Assembly of 1960, Section 58-19.1 of the Code of Virginia and Section 141 of the Constitution of Virginia as amended.

This Ordinance shall be full force and effective after its passage by the Board of Supervisors of Prince Edward County and the publication thereof as provided by law on the 6th day of August, 1960 and each and every year thereafter.

[fol. 167]

APPENDIX C TO COMPLAINT IN INTERVENTION

Be It Ordained that any parent, guardian or person in loco parentis to any child between six and twenty years of age, which child is a resident of Prince Edward County as hereinafter provided, is authorized to make application as hereinafter provided for a grant of funds to be used in furtherance of the elementary and secondary education of such child in private nonsectarian schools located within the County of Prince Edward, and in public schools located within the State of Virginia.

Section I

How Such Application Made, What it Shall Contain

A. The parent, guardian or person in loco parentis to any child shall make application for such grants upon forms provided by the Board of Supervisors of Prince Edward County, shall sign the same and make oath to the facts therein stated and shall file the same on or before the 1st day of September, 1960 or any succeeding year with the Board of Supervisors of Prince Edward County or with such person as the Board may designate to receive and examine such application.

B. The parent, guardian or person in loco parentis to such child in order to be eligible to receive a grant of funds under this ordinance shall, as a part of such application, make oaths to the following facts:

(a) The name of the parent, guardian or person in loco parentis making the application and the name, age and residence of each child on whose behalf the application is made.

(b) That the person signing the application is legally responsible for the care of each child for whose benefit the application is made.

(c) That each child in whose behalf the application is made has attained six years of age and has not attained the age of twenty years.

(d) That the said child is an actual bona fide resident of Prince Edward County and is educable.

(e) That each child on whose behalf the application is filed will be enrolled in either a private nonsectarian elementary or secondary school within the County of Prince Edward or in a public school within the State of Virginia wherein tuition is charged in at least the amount of the grant applied for.

(f) That said child is not detained or confined in any public institution.

(g) That said child is or will be enrolled during the school year for which the application is made in a course of systematic educational instruction or training of not less than one hundred eighty days duration or the substantial equivalent thereof, and shall give the name and location of said school, or the name of the person, or persons, offering such course of instruction or training and the place at which it will be offered.

(h) That said child has not graduated or completed the course of study offered at the high school level.

[fol. 168] (i) That the person making the application agrees to refund any grant made thereunder if said child for whom the grant is made fails to attend school at least one hundred fifty days per school year, unless the Board of Supervisors by resolution releases such obligation to refund on account of sickness of the child or other unavoidable or oppressive circumstances.

SECTION II

Minimum Amount of Grant; Discretion to Increase the Amount; How and to Whom Paid; Termination Thereof . . .

(1) The amount of each grant paid under this Ordinance shall be for a sum not less than One Hundred Dollars ($100.00) per year for each child and the amount thereof may be increased in the discretion of the Board of Supervisors by resolution adopted on or before the end of any fiscal year.

(2) Upon approval by the Board of Supervisors of the application therefor it shall by resolution make appropriation for the payment of each grant and shall authorize the Treasurer to make payment thereof upon warrants of the Board of Supervisors, as provided by law, for the payment of other claims against the County.

(3) Upon denial of an application or inability to act thereon because of the absence of necessary information, the Board shall give notice to the applicant of its action within a reasonable time thereafter by mailing said notice to the post office address given in the application. Within

15 days after the mailing of said notice any applicant who feels aggrieved by the action of the Board shall file with the Board or its designated agent a petition for a review of its action. Such petition shall state the reasons for his objection to the action of the Board and shall be heard by the Board at its next meeting provided the said meeting is at least 15 days after the filing date of the petition for such hearing. Such hearing shall be informally conducted and the aggrieved party shall have the right to offer evidence and to be represented by counsel.

Within 15 days after such hearing the Board shall notify such aggrieved party of its final action upon such application and any applicant feeling aggrieved thereby shall have the right of appeal to the Circuit Court of the County of Prince Edward as provided by law.

(4) The Board of Supervisors shall pay not more than half of any grant on or before the 15th day of October of the school year for which paid and the remainder at such intervals as it may deem proper, provided that the total amount thereof shall be paid not later than the 31st day of May of the school year for which the grant is made, and provided further that upon the violation of any condition set forth in the application therefor or upon the ascertainment that any false representation has been made in procuring said grant, the Board shall terminate the same and any balance thereof shall not be paid.

Section III

Defining Unlawful Acts in Violation of This Ordinance and Prescribing Penalty Therefor . . .

A. Any person who shall willfully make a false statement in any application for a grant under this Ordinance shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not to exceed three hundred dollars ($300.00) or by confinement in jail not exceeding 30 days.

[fol. 169] B. It shall be unlawful and constitute a misdemeanor for any person, firm, association or corporation

receiving a grant for educational purposes under this Ordinance to use the sum so received for any purpose other than for educational purposes in a private nonsectarian school located within the County of Prince Edward or in public schools located within the State of Virginia. Any person violating this section shall be subject to a fine not exceeding three hundred dollars ($300.00) or confinement in jail not exceeding 30 days.

Section IV

If Part Declared Unconstitutional, Other Parts to Remain in Force . . .

If any part, section, portion or provision of this Ordinance or the application thereof to any person or circumstance be held invalid by a court of final resort, such holding shall not affect any part, section, portion, provision or application of this Ordinance which can be given effect without the part, section, portion, provision or application so held invalid; and to this end, the parts, sections, portions, provisions and applications hereof are declared severable.

This Ordinance, comprised of Section I through Section IV is passed pursuant to Chapter 461 of the Acts of the General Assembly approved March 31, 1960, Code Section 22-115.37 and other sections of the Code of Virginia granting the powers herein exercised to the Board of Supervisors and pursuant to Section 141 of the Constitution of Virginia as amended.

This Ordinance shall be in full force and effective after its passage by the Board of Supervisors of Prince Edward County and the publication thereof as provided by law on the 6th day of August, 1960 and each and every year thereafter.

[fol. 170] Certificate of Service (omitted in printing).

[fol. 171] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division
Civil Action No. 1333

EVA ALLEN, et al.

v.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, VIRGINIA, et al.

MOTION OF SCHOOL BOARD OF PRINCE EDWARD COUNTY TO DISMISS THE AMENDED SUPPLEMENTAL COMPLAINT PERMITTED TO BE FILED BY ORDER OF APRIL 24, 1961, ETC.—Filed May 1, 1961

I.

The defendant School Board of Prince Edward County moves that the Amended Supplemental Complaint permitted to be filed by Order of April 24, 1961, be dismissed for the following reasons:

1. Said Amended Supplemental Complaint alleges new causes of action different from that alleged in the original Complaint; the relief sought is alien to that sought in the original Complaint and it is sought against persons not parties to the original suit and who were foreign to the relief sought therein.

The original Complaint alleged racial discrimination in the admission, enrollment and education of Negro children in the public schools of the County and sought an injunction against the County School Board and Division Superintendent of Schools, restraining such alleged discriminatory practices. The Amended Supplemental Complaint alleges that no public schools are being maintained in Prince Edward County. It alleges that the Board of

Supervisors of the County have not made and do not intend to make any levy or appropriation for the operation of public schools in the County; that it has by ordinance provided for a County tax credit to be given for contributions made to certain nonprofit and nonsectarian private schools; that by another ordinance it has provided for scholarship grants from County funds in aid of any child, resident in the County, desiring to attend a nonsectarian private school or desiring to attend a public school in another locality; and that all or most of said [fol. 172] grants in aid have been paid to or in reimbursement for sums paid to the Prince Edward School Foundation which was organized to provide educational opportunities for white children only and for the education of white children residing in the County.

Said Amended Supplemental Complaint further alleges that the State Board of Education and the Superintendent of Public Instruction have not acted to discharge an alleged obligation of Virginia to operate schools in Prince Edward County; that said State Board and Superintendent, from funds which would otherwise have been available for the operation of public schools in the County, have approved tuition grants to more than a thousand white children to attend the schools operated by said Foundation.

Said Amended Supplemental Complaint finally alleges that the School Board of Prince Edward County is considering and contemplating the conveyance, lease or transfer of public schools or public school properties of the County.

Upon these allegations said Amended Supplemental Complaint seeks by mandatory injunction to compel the operation of public schools in Prince Edward County; to enjoin all the defendants from expending any public funds in support of any private school which excludes Negroes or from expending any public funds in aid of the attendance of any child at any such school; to enjoin the giving of any tax credit for contributions to any such schools; and finally to enjoin the sale or lease of the public schools and facilities in said County.

2. On the face of said Amended Supplemental Complaint, when read with the Order of this Court of April 22, 1960, it appears that the alleged actions complained of do not and cannot render said Order ineffective or unenforceable or circumvent or frustrate the enforcement thereof.

[fol. 173] 3. The Amended Supplemental Complaint alleges no cause of action over which this Court should entertain jurisdiction because it calls for construction of provisions of the Constitution of Virginia, of her statutes, and of ordinances of the Board of Supervisors of the County of Prince Edward relating to matters of primary importance involving relations between Nation and State. The Supreme Court of Appeals of Virginia has not construed these constitutional provisions, statutes, and ordinances. Such construction will be binding on this Court and may eliminate alleged constitutional issues presented in the Amended Supplemental Complaint. A proper regard for our Federal system requires that complainants present these questions of State Constitution, laws and County ordinances to the proper State courts for determination.

4. The Amended Supplemental Complaint prays for reliefs which this Court has no jurisdiction to grant.

5. The Amended Supplemental Complaint does not allege that any statute or ordinance is unconstitutional or that any statute or ordinance is being administered in an unconstitutional manner. It attacks them because of the alleged motive or purpose of the individuals composing legislative bodies. A statute or ordinance otherwise constitutional which is administered in a constitutional manner does not become unconstitutional because of any motive or purpose of legislators.

II.

If the preceding motion be overruled, the defendant School Board of Prince Edward County moves that Section I, II, III, and IV of the Amended Supplemental Complaint and Paragraphs (a), (b), (c), and (d) of the prayers

thereof be dismissed as to it because this defendant has no authority or power to levy any taxes or to appropriate any funds or to provide for any tax credit or to give any scholarship grant in aid or any tuition grant. Indeed its [fol. 174] power in these regards is confined to the making of budgetary recommendations to the County Board of Supervisors, and said Amended Supplemental Complaint expressly admits it has performed its duty in connection with that power.

III.

If the foregoing motions be overruled, the defendant School Board of Prince Edward County moves that Paragraphs (b), (c), and (d) of the prayers of the Amended Supplemental Complaint be dismissed because the allegations of said Complaint are confined to Prince Edward County and these prayers seek injunctions not only in connection with schools in Prince Edward County but also concerning funds and schools entirely foreign to Prince Edward County.

IV.

Should the motion made in Section I hereof be overruled, the defendant School Board of Prince Edward County moves that Section V of the Amended Supplemental Complaint and Paragraph (e) of the prayers thereof be dismissed:

Because no sale of school property exceeding $500.00 in value may be made under § 22-161 of the Code of Virginia, as amended, without order approving and ratifying the same being obtained from the Circuit Court of Prince Edward County, Virginia, and any questions concerning any sale pursuant to that section must at the least be first raised before that Court.

Because §§ 22-164.1 and 22-164.2 of said Code do not relate to or affect the conveyance, lease, or transfer of the public schools and public school property of the County.

Because no conveyance, lease, or transfer of school property can be had pursuant to §§ 22-161.1 to 22-161.5, inclusive, of said Code unless 10 per centum of the voters voting in

the last preceding presidential election in the County and all petition the Circuit Court of Prince Edward County for [fol. 175] entry of an order for an election by the people of the County to determine whether the property or properties specified are or are not needed for public purposes and not until favorable outcome of that vote can sale be made. Said Amended Supplemental Complaint does not allege that any of these acts which are conditions precedent to sale have been taken or are contemplated.

County School Board of Prince Edward County, Virginia, By Collins Denny, Jr., Of Counsel.

Denny, Valentine & Davenport, Collins Denny, Jr., John F. Kay, Jr., 1300 Travelers Building, Richmond 19, Virginia.

C. F. Hicks, DeHardit, Martin & Hicks, Gloucester, Virginia, Counsel for said Board.

CERTIFICATE OF SERVICE (omitted in printing).

[fol. 176] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION
Civil Action No. 1333

EVA ALLEN, et al.

v.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, etc., et al.

OPINION DENYING WITHOUT PREJUDICE MOTIONS TO DISMISS AMENDED SUPPLEMENTAL COMPLAINT, ETC.—June 14, 1961

This case came on to be heard upon the motions to dismiss the amended supplemental complaint, upon the written briefs and argument of counsel.

The principal contentions of the various defendants in support of their motions to dismiss are summarized as follows:

The amended supplemental complaint is a suit against the Commonwealth of Virginia in contravention of the Eleventh Amendment to the Constitution of the United States.

The Doctrine of Abstention should be invoked.

[fol. 177] The injunctive relief requested can not be granted except by a district court of three judges.

The amended supplemental complaint created a new cause of action.

The paramount question raised by the amended supplemental complaint is, whether or not the defendants, individually or in concert with each other, are deliberately circumventing or attempting to circumvent or frustrate the order of this Court.

On that question the plaintiffs are entitled to be heard.

Therefore, the motions to dismiss are herewith denied, without prejudice to the rights of the defendants or any of them to renew their motions upon the conclusion of the hearing if they are then so advised.

If during the course of the hearing the Court is of the opinion that it will be necessary to construe and/or interpret certain sections of the Constitution of Virginia or the [fol. 178] statutes made pursuant thereto, pertaining to the maintenance of a system of free public schools, not heretofore passed upon by the Supreme Court of Appeals of Virginia, further proceedings herein will be stayed for a reasonable period to permit the parties or any of them to institute appropriate action in the state courts.

Likewise, if a district court of three judges is deemed necessary pursuant to Title 28, Section 2284, United States Code, further proceedings herein will be stayed until such a court can be convened.

The defendants are granted twenty days from the date of this opinion to file their answer and/or other responsive pleadings to the amended supplemental complaint.

July 24, 1961, at 10:00 o'clock A.M., E.D.S.T., is fixed as the date for the hearing on the merits. A formal pre-trial of the issues to be heard will be scheduled for July 10, 1961, at 4:00 o'clock P.M., E.D.S.T., if requested by any of the parties, otherwise counsel for all parties shall ten days before the trial date exchange with each other copies of all [fol. 179] exhibits intended to be introduced as evidence. Formal proof of authenticity of such document will be deemed to be waived unless objected to in writing three days prior to trial, in which event the offering party must be prepared to offer the necessary formal proof. All other questions of admissibility such as relevancy, etc., will be ruled upon when and as the exhibit is offered in evidence.

Counsel for all parties shall also within the same time limits exchange lists showing the names and addresses of all witnesses they intend to call. The name and address of later discovered witnesses must be exchanged when and as discovered, otherwise witnesses presented on the date of the trial will not be permitted to testify except by leave of Court for good cause shown.

Counsel for the plaintiffs should prepare an order in accord with the foregoing, submit same to counsel for defendants for approval as to form, and it will be accordingly entered effective this date.

Oren R. Lewis, United States District Judge.

Richmond, Virginia, June 14, 1961.

[fol. 180] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION
Civil Action No. 1333

EVA ALLEN, et al.,

v.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, etc., et al.

MEMORANDUM OPINION—June 14, 1961

The United States seeks to intervene as a party plaintiff in the above captioned matter. A better understanding of the question now before the Court necessitates a brief history of the main action.

In compliance with the decision rendered in Brown v. Board of Education, 349 U.S. 294 (1955), an order was entered in this suit under date of November 26, 1958, providing, among other things, that the defendants proceed promptly with the formulation of a plan to comply with the order of this Court heretofore entered enjoining them from discriminating against the plaintiffs in admission to the public schools of the County solely on account of race. [fol. 181] Said defendants were further directed to report to the Court on or before January 1, 1959, the progress made in the formulation of such plan and were further directed to comply with the terms of the injunction heretofore entered commencing with the opening of the school year 1965.

The Court of Appeals for the Fourth Circuit under date of May 5, 1959, reversed this Court and remanded the case, with directions to issue an order in accordance with that opinion, which provided, among other things, that the de-

fendants be enjoined from any action that regulates or affects on the basis of color the enrollment or education of the infant plaintiffs, or any other Negro children similarly situated, to the high schools operated by the defendants in the County, and to take immediate steps in this regard to the end that the applications be considered so as to permit the entrance of qualified persons into the white schools in the school term beginning September 1959. No decree was entered pursuant to the mandate of the Court of Appeals until the petitioners presented an appropriate order for entry therein on April 22, 1960, pertinent portions [fol. 182] of said order being:

> "The defendants are restrained and enjoined from any action that regulates or affects on the basis of race or color the admission, enrollment or education of the infant plaintiffs, or any other Negro children similarly situated, to the high schools operated by the defendants in the County and that the defendants receive and consider the applications of such persons for admission to such high schools without regard to race or color.
>
> "That the defendants make plans for the admission of pupils in the elementary schools of the County without regard to race or color and to receive and consider applications to this end at the earliest practical day."

The Court and all counsel of record had knowledge of the fact that the public schools of Prince Edward County were closed prior to the entry of the said order.

Under date of July 8, 1960, counsel for the plaintiffs filed a motion to intervene additional plaintiffs; a motion for leave to file a supplemental complaint and to add additional defendants; to all of which motions the defendants objected. On September 16, 1960, the said motions were granted. By consent decree, the time for the filing of responsive pleadings to the supplemental complaint was extended to October 24, 1960.

[fol. 183] The defendants filed motions to dismiss the supplemental complaint. Prior to the hearing of said motions, the plaintiffs on January 13, 1961, filed a motion for leave to amend their supplemental complaint and to

add the Board of Supervisors of Prince Edward County and J. W. Wilson, Jr., Treasurer of Prince Edward County, as additional defendants.

Upon consideration of the said motions the Court under date of April 24, 1961, granted plaintiffs leave to amend their supplemental complaint and to add the Board of Supervisors of Prince Edward County and J. W. Wilson, Jr., Treasurer of Prince Edward County, as additional defendants. The order fixed May 1, 1961, as the last date for the plaintiffs to offer any further amendments to their pleadings and as the last date for the defendants to file any motions in response thereto. The hearing of the motions thus filed was set for May 8, 1961.

Under date of April 26, 1961, the United States, by Robert F. Kennedy, Attorney General, and Joseph S. Bambacus, United States Attorney for the Eastern District of Virginia, moved the Court for leave to intervene as a [fol. 184] plaintiff in this action and to file a complaint in intervention, and to add as parties defendant the Prince Edward School Foundation, a corporation, the Commonwealth of Virginia, and Sydney C. Day, Jr., Comptroller of Virginia.

The United States, in support of its motion to intervene, alleges that intervention

> "is necessary in order to prevent the circumvention and nullification of the prior orders of this Court and to safeguard the due administration of justice and the integrity of the judicial processes of the United States.
>
> "The claim of the United States, as set forth in the complaint in intervention, involves questions of both law and fact in common with those raised by the amended supplemental complaint filed by the plaintiffs herein."

The motion was made under and pursuant to Sections 309 and 316, Title 5, United States Code, and Rule 24 of the Rules of Civil Procedure. The United States requested a hearing, on its motion to intervene, on May 8, 1961. The motion was then heard.

All of the defendants to this suit and the additional parties sought to be made defendants objected to the in-

tervention of the United States as a party plaintiff. The plaintiffs supported the Government's position. The mat-
[fol. 185] ter was fully and ably argued by counsel for all parties and the written briefs have been carefully considered by the Court.

Rule 24 of the Rules of Civil Procedure provides for intervention of right and permissive intervention.

> Rule 24. (a) "Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof."

It is therefore necessary to first determine whether or not the United States, as a matter of right, may intervene in this suit as a party plaintiff. If it has such a right, its application therefor must be "timely" filed; the rule specifically so provides. The able Assistant Attorney General of the United States, both in his oral argument and in his written brief, totally ignored this requirement of the rule. The Government offered no excuse or extenuating circum-
[fol. 186] stances justifying a delay of more than a year in the filing of the Government's motion in intervention.[1]

In view of the necessity of scheduling an early hearing on the merits of the plaintiff's amended supplemental complaint and the unexplained delay on the part of the Government in filing its motion in intervention, there is a serious question in the Court's mind as to whether or not the motion was "timely" filed.

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[1] The order of this Court which they allege as being circumvented, was entered April 22, 1960. The Government's motion in intervention was filed April 26, 1961.

The Government does not contend that it has a statutory right to intervene in this suit. However, the Court's attention has been called to the fact that several bills have been introduced in the Congress of the United States and some are now pending, specifically granting unto the Attorney General of the United States the right to intervene in suits of this type as a party plaintiff. None of these bills, however, have been enacted into law. Thus to grant intervention in this case, in the absence of statutory authority, [fol. 187] would appear to be contrary to the intent of Congress. This, however, the Court need not decide, because the Attorney General relies primarily on Section (2) of Rule 24 (a).

He contends:

> "The interest of the United States, which is unique, is not represented by any of the existing parties. The plaintiffs seek to secure their constitutional rights, but the United States seeks to preserve its judicial processes against impairment by obstruction or circumvention. These clearly are distinct interests. Moreover, the due administration of justice is a sovereign interest that cannot properly be entrusted for safeguarding to private parties. The representation of the interest of the United States by the plaintiffs is plainly inadequate."

The Attorney General further contends:

> "The United States, by its complaint in intervention, has joined the State of Virginia in order to secure complete relief in this action, in which the United States contends that the State is circumventing this Court's order by action which is unlawful in that it denies to the residents of Prince Edward County the equal protection of the laws. But the State of Virginia can be made a defendant only by the United States, [fol. 188] since the Eleventh Amendment of the United States Constitution bars the plaintiffs from suing a State without its consent."

In support of this contention, the Attorney General seeks to parallel the situation in Prince Edward County with the former situation in Little Rock and New Orleans. The facts in these cases do not justify such a comparison. In the latter cases, open defiance of Federal Court orders was obvious. In Virginia this complex problem has been and is being solved in a lawful and proper manner through the courts. There has been no known defiance of this Court's orders by either the State of Virginia or the County of Prince Edward. Even under the situation then existing in Little Rock and New Orleans, the Attorney General, insofar as this Court knows, did not move to intervene as a party plaintiff for any purpose. To the contrary, the Government's participation in those cases was at the Court's invitation as amicus curiae.[2]

[fol. 189] The precise question before this Court, in the case under consideration, is whether or not the defendants, or any of them, are violating or circumventing its orders. To find the defendants guilty of so doing without a hearing would be a clear violation of the defendants' constitutional rights. That, this Court will not do. The United States has no right to intervene as a party plaintiff in this case on that ground until this Court has first determined that its orders are in fact being violated or circumvented.

The Attorney General further argues, however, that the plaintiffs are unable to represent adequately the interest of the United States because the plaintiffs can not make the Commonwealth of Virginia a party defendant by virtue of the Eleventh Amendment to the United States Constitution.[3] Surely, that is not the "interest" referred to in the statute. If the United States has a cause of action against the Commonwealth of Virginia, in this or any other type

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[2] A party plaintiff assumes the role of a party litigant. It is allowed to file pleadings, offer evidence, file briefs and seek relief. It has a right to reasonably control its side of the case; amicus curiae is technically "a friend of the Court", as distinguished from an advocate. It arises only via an ex parte order of the Court and fully advises the Court on the law in order that justice may be attained.

[3] See United States v. Texas, 143 U.S. 621; United States v. California, 332 U.S. 19.

of suit, the right to maintain that cause of action is not predicated upon the right to intervene as a party plaintiff [fol. 190] in a suit instituted by private plaintiffs seeking to secure their constitutional rights.

The Attorney General cites numerous cases in support of his contention that the United States by virtue of its national sovereignty has a sufficient general interest in this case to be permitted to intervene of right. Suffice it to say that none of the cited cases are sufficiently in point with the facts in this case to sustain his contention.

> "It is well settled that the only interest which will entitle a person to the right of intervention in a case is a legal interest as distinguished from interests of a general and indefinite character which do not give rise to definite legal rights." See Jewell Ridge Coal Corp. v. Local No. 6167, etc., 3 FRD 251. See also Radford Iron Co. Inc. v. Appalachian Electric Power Co., 62 F. 2d 940.

The Attorney General next contends Rule 24 must be considered in connection with Title 5, Sections 309 and 316,* U.S.C.A. With this we do not disagree. Clearly, [fol. 191] these statutes give very broad authority to the Attorney General to institute and conduct litigation in

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* Section 309. "Conduct and argument of cases by Attorney General and Solicitor General. Except when the Attorney General in particular cases otherwise directs, the Attorney General and Solicitor General shall conduct and argue suits and writs of error and appeals in the Supreme Court and suits in the Court of Claims in which the United States is interested, and the Attorney General may, whenever he deems it for the interest of the United States, either in person conduct and argue any case in any court of the United States in which the United States is interested, or may direct the Solicitor General or any officer of the Department of Justice to do so."

Section 316. "Interest of United States in pending suits. The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in any suit pending in any of the courts of the United States, or in the courts of any State, or to attend to any other interest of the United States."

order to establish and safeguard Government rights and properties.

In our view of the matter, having reached the opinion that the United States does not have such an "interest" in the instant case as is required by Rule 24(a), these statutes are not applicable, for they likewise require the United States to have such an "interest".

Therefore this Court is of the opinion that the United States has no absolute right of intervention in this suit under Rule 24 (a).

The Attorney General further argues, however, that if the Court be of such opinion, the United States, in any [fol. 192] event, ought to be permitted to intervene under Rule 24 (b) Permissive Intervention, which reads as follows:

> "Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

The granting of the motion under this section lies within the sound discretion of the Court and in so determining the Court must consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

In the judicial exercise of this discretion it is deemed proper that the allegations of the proposed complaint of intervention be carefully examined and compared with the allegations of the amended supplemental complaint now pending before this Court.

[fol. 193] The material allegations of the complaint in intervention are summarized as follows:

Section 129 of the Constitution of Virginia requires that the General Assembly establish and maintain a system of public free schools throughout the state; prior to June 1959, free public schools were being maintained in Prince Edward County, educating approximately 1700 Negro and 1400 white pupils; segregated schools were then being maintained; under date of May 17, 1954, the Supreme Court of the United States held that state operation of racially segregated schools in Prince Edward County was unconstitutional; in July 1954, the Supervisors of Prince Edward County expressed opposition to the operation of racially unsegregated public schools; in July 1955, this Court entered an order requiring that the public schools in Prince Edward County be racially desegregated with all deliberate speed; in May 1956, the Board of Supervisors of Prince Edward County, in response to a request of 4,000 white citizens, adopted a resolution declaring it to be the policy of the Board that no county tax levy should be made for operation of public schools on a non-segregated basis; [fol. 194] on May 5, 1959, the Court of Appeals for the Fourth Circuit directed the entry of an order requiring that the public schools of Prince Edward County be operated on a racially non-discriminatory basis, commencing in the fall of 1959; Articles of Incorporation were executed on May 26, 1959, for the creation of Prince Edward School Foundation for the purpose of operating elementary and high schools in Prince Edward County for the education of children of the white race exclusively; on June 2, 1959, the Board of Supervisors of Prince Edward County did not levy taxes for the operation of public schools for the school year 1959-60; public schools in Prince Edward County were not opened for the fall semester of 1959 and have not been opened since that date; the Prince Edward School Foundation began operating in September 1959; approximately 1400 white children attended; no tuition or fees were charged for educating these students; the Foundation obtained its funds through contributions for the school year 1959-60; on April 22, 1960, this Court entered an

order enjoining the defendants from any action that regulated or affected the enrollment or education of Negro children on the basis of race or color to the public high [fol. 195] school of Prince Edward County and further requiring the defendant to make plans for the admission of pupils to the elementary schools of the County without regard to race or color at the earliest practical date; in June 1960, the Board of Supervisors adopted a budget including funds for educational purposes, but without providing funds to permit operation of public schools; in July 1960, the Board of Supervisors adopted an ordinance requiring the County Treasurer to allow a certain credit against real estate and personal property taxes on account of any contributions made to a certain private school located in Prince Edward County; the Board of Supervisors on the same day adopted a tuition grant plan of not less than $100.00 per year per child who was enrolled in a private non-sectarian school within the County or in a public school within the state; that the only non-sectarian private school within the County was the Prince Edward School Foundation; $58,000.00 in tax credits have been granted on account of contributions to the Prince Edward School Foundation; the Foundation for the school year 1960-61 charged a $240.00 tuition for elementary schools and a $265.00 tuition for high schools; tuition grants from [fol. 196] the state and county amount of $225.00 for elementary students and $250.00 for high school students; in December 1960, a number of Negro residents petitioned the Board of Supervisors to reopen the public schools of the County; this request was denied; since June 1959, the defendants have failed and refused to maintain free public schools in Prince Edward County; the purpose and effect has been and is to prevent the operation of public schools in compliance with the orders of this Court on a racially non-discriminatory basis; since June 1959, the defendants have maintained the schools of the Prince Edward School Foundation for the education of white children residing in Prince Edward County; since that date no schools have been operated in Prince Edward County for Negro children; a system of free public schools is being maintained elsewhere in the State of Virginia; the failure and

refusal of all of the defendants, including the State, to maintain free public schools in Prince Edward County, while such a system is being maintained in the rest of the State, denies to the Negro residents of the County, rights secured under the Fourteenth Amendment to the Constitution.

[fol. 197] The complaint in intervention prays that this Court enter an order enjoining the defendants from failing or refusing to maintain free public schools in Prince Edward County; for an order enjoining the defendants from paying tuition grants to students attending Prince Edward School Foundation so long as public schools are closed; for an order enjoining certain defendants from allowing any credit to taxpayers on account of contributions to the Prince Edward School Foundation, during the time public schools are closed in Prince Edward County; for an order enjoining all the defendants, including the State of Virginia, from the payment of any funds of the State for the maintenance of public schools anywhere in Virginia during such period as public schools are closed in Prince Edward County.

The allegations of the amended supplemental complaint are substantially the same except that paragraph 16 of the amended supplemental complaint alleges that the County School Board of Prince Edward County is considering and contemplating the conveyance, lease or transfer of the public schools and public school property to some private corporation, etc.

[fol. 198] The amended supplemental complaint does not, however, seek to make Prince Edward School Foundation, the State of Virginia, or its Comptroller General parties defendant.

The prayers of the amended supplemental complaint request this Court to enter an order enjoining the present defendants (not the State of Virginia) from refusing to maintain free public schools in Prince Edward County; from expending public funds for the direct or indirect support of any private school which excludes the infant plaintiffs and others similarly situated by reason of race; from crediting any taxpayer with money paid or contributed to any private school which excludes the infant plaintiffs and

others similarly situated for the reason of race; from conveying, leasing or otherwise transferring title, possession or operation of public schools and facilities incidental thereto to any private corporation.

It is apparent from a comparison of the complaint in intervention with the amended supplemental complaint that the material difference therein is that the United States in its complaint in intervention seeks to make the Prince Edward School Foundation, the State of Virginia and its Comptroller General parties defendant and to have this Court enter an order enjoining the State of Virginia [fol. 199] from failing or refusing to maintain free public schools in Prince Edward County and enjoining the State from the expenditure of any of its funds for the maintenance of free public schools throughout the rest of Virginia so long as the free public schools of Prince Edward County remain closed. Such relief, if granted, would be unnecessarily punitive, in that it would require the closing of most, if not all, of the free public schools in Virginia. Whether the means, if legal, justifies the end is questionable, to say the least.

Although the Assistant Attorney General, in his argument before the Court, stated that "it was not the intent of the Government to force the closing of the public schools in Virginia; to the contrary, the purpose of the Government was to force the opening of the schools in Prince Edward County", he refused to delete this prayer from the complaint in intervention, stating "he did not have the authority to so do". Therefore this Court can only conclude, if the Government be permitted to intervene as a party plaintiff, it would urge this Court to enter an order that could jeopardize the education of several hundred thousand Virginia children who have no responsibility whatsoever for the closing of public schools in Prince Edward County.

[fol. 200] If this Court were to entertain the complaint in intervention in its present form, it would be necessary for the Court to construe and interpret certain sections of the Constitution of Virginia and laws adopted pursuant thereto pertaining to the maintenance of a system of free public schools in the State of Virginia. Abstinence in state affairs

when not in conflict with the United States Constitution[5] has long been the federal policy. "This now well-established procedure is aimed at the avoidance of unnecessary interference by the federal courts with proper and validly administered state concerns, a course so essential to the balanced working of our federal system. To minimize the possibility of such interference a 'scrupulous regard for the rightful independence of state governments should at all times actuate the federal courts,' Matthews v. Rodgers, 284 U.S. 521, 525, as their 'contribution in furthering the harmonious relation between state and federal authority.' Railroad Comm'r v. Pullman Co., 312 U.S. 496." Harrison [fol. 201] v. NAACP, 360 U.S. 167.

Further, since the complaint in intervention seeks to make the Commonwealth of Virginia a party defendant, thereby making the suit a direct action against the State, it would be necessary, if an injunction were to issue against the State, to convene a three-judge District Court as provided for in Title 28, Section 2281 of the United States Code. These are not questions of law or fact in common with the main action. To the contrary, they are new and independent assertions, which admittedly are not alleged in the amended supplemental complaint. A determination of these questions, whether heard by a three-judge court or by the Supreme Court of Appeals of Virginia, by virtue of the Doctrine of Abstention, will materially delay the adjudication of the private constitutional rights asserted by the individual plaintiffs in the main action. Further delay would inevitably occur as a result of an appeal to the Supreme Court of the United States, during which interim the "status quo" would be maintained in Prince Edward County.

The Attorney General cites many of the same authorities and arguments in support of permissive intervention as [fol. 202] were asserted in support of intervention of right. It is unnecessary to comment further on most of them. However, the Attorney General insists that the Department

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[5] This Court knows of no provision of the United States Constitution which provides that the states shall provide a system of free public education and none has been cited.

of Justice is better equipped than the private plaintiffs to represent and defend the national interest. He states:

> "It has an experienced legal staff which is conversant with the legal issues involved herein. It also has the investigative facilities of the Federal Bureau of Investigation and the services of the United States Attorney to attend upon the Court. Thus, the public interest in assuring that all the implications of the issues are brought to the attention of the Court warrants the Government's intervention here."

This is undoubtedly true, but whether or not the Department of Justice should use its vast resources as a party litigant in a suit it admits was instituted by private citizens to secure their constitutional rights, is a question this Court need not decide.

The Court being of the opinion the granting of intervention will unduly delay and prejudice the adjudication of the rights of the original parties, the motion of the United States to intervene as a party plaintiff and to add as parties defendant the Prince Edward School Foundation, the Commonwealth of Virginia, and Sydney C. Day, Jr., Comptroller of Virginia, is denied.

[fol. 203] Counsel for the defendants should prepare an appropriate order, in accord with this opinion, submit it to counsel for plaintiffs and counsel for the United States for approval as to form, and present the same for entry herein.

Oren R. Lewis, United States District Judge.

June 14, 1961

[fol. 204] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION
Civil Action No. 1333

EVA ALLEN, et al., Plaintiffs,

v.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, VIRGINIA, et al., Defendants.

MOTION OF COUNTY SCHOOL BOARD FOR LEAVE TO FILE REPORT—Filed June 15, 1961

Defendant, County School Board of Prince Edward County, Virginia, moves the Court for an order permitting the filing of the attached report.

While said defendant does not believe it is required by any order or provision of law to bring to the attention of the Court the matter set forth in said report, it does believe that it is proper for it so to do.

Collins Denny Jr., of Counsel for Defendant, County School Board of Prince Edward County, Virginia.

Denny, Valentine & Davenport, Collins Denny, Jr., John F. Kay, Jr., 1300 Travelers Building, Richmond 19, Virginia.

C. F. Hicks, DeHardit, Martin & Hicks, Gloucester, Virginia, Counsel for County School Board of Prince Edward County, Virginia.

NOTICE

To:

Robert L. Carter, Esquire, 20 West 40th Street, New York 18, New York.

[fol. 205] S. W. Tucker, Esquire, 111 East Atlantic Street, Emporia, Virginia, Counsel for Plaintiffs.

Honorable Frederick T. Gray, Attorney General of Virginia, State Library Building, Richmond, Virginia.

Honorable J. Segar Gravatt, Attorney at Law, Blackstone, Virginia, Counsel for other Defendants.

Please take notice that counsel for the County School Board of Prince Edward County, Virginia, will bring the foregoing motion on for hearing before this Court at its courtroom in the United States Post Office Building, Richmond, Virginia, on the 26th day of June, 1961, at 10:00 o'clock a.m. of that day or as soon thereafter as counsel can be heard.

Collins Denny, Jr., of Counsel for Defendant, County School Board of Prince Edward County, Virginia.

CERTIFICATE

I certify that copies of the foregoing Motion together with copies of report and letter thereto attached were served upon other parties hereto by mailing copy thereof on June 15th, 1961, to Robert L. Carter, Esquire and S. W. Tucker, Esquire, Counsel for Plaintiffs and to Honorable Frederick T. Gray, Attorney General of Virginia and Honorable J. Segar Gravatt, Counsel for other Defendants at their respective addresses listed above.

Collins Denny, Jr.

[fol. 206] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION
Civil Action No. 1333

EVA ALLEN, et al., Plaintiffs,

v.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, VIRGINIA, et al., Defendants.

REPORT FROM SCHOOL BOARD OF PRINCE EDWARD COUNTY, VIRGINIA—Filed July 24, 1961

To the Honorable Oren R. Lewis, Judge of said Court:

The defendant, School Board of Prince Edward County, Virginia, desires to make report to the Court of a certain action recently taken by it. It does so not because it believes the current order of Court so requires or that any provision of law so requires. It does so as a matter of courtesy.

The Board has been anxious to do anything it might properly do to aid the cause of education in the County. It learned a few weeks ago, with the greatest interest, of a suggestion that the Virginia Teachers Association conduct a "crash" program this summer for those children in the County who have not been attending school. It is probable that that Association will command the confidence of the parents of these children and those who have been influencing them and that it may thus succeed in bringing some educational opportunity to these children.

The buildings and equipment owned by this Board, erected with the intent that they would be used for the benefit of all the children of the County, have now for two years stood idle. The School Board believes it is proper

[fol. 207] and permissible that it offer those facilities to the Virginia Teachers Association to assist it in its purpose. It has accordingly, after first consulting with its counsel, addressed to Dr. J. Rupert Picott a letter, a copy of which is attached hereto.

Respectfully submitted,

School Board of Prince Edward County, Virginia,
By Collins Denny, Jr., of Counsel.

[fol. 208]

PRINCE EDWARD COUNTY PUBLIC SCHOOLS

Office of the Division Superintendent

Farmville, Virginia

June 14, 1961

Dr. J. Rupert Picott
Executive Secretary
Virginia Teachers Association
316 East Clay Street
Richmond 19, Virginia

Dear Dr. Picott:

The School Board of Prince Edward County, along with the public generally throughout the County, has been deeply distressed that a substantial segment of the children of the County have now for two years been without schools. The members of the School Board have noted with the keenest interest that the Virginia Teachers Association proposes this summer to attempt to operate a "crash remedial program" for so many of these children as will avail themselves of it. We trust this program will meet with great success. Supported as it will be by your organization, it should elicit the confidence of those whom it is designed to aid.

The School Board believes that it should do all it can to help. We have, as you know, the buildings formerly used as public schools. They stand idle. I am directed by the Board to offer such of them as may be helpful to your organ-

ization for the furtherance of this program without cost to your Association. The Board, of course, does not desire or seek in any way to influence your program; since it is responsible for the upkeep and repair of the physical properties, it would at the expense of the Board maintain custodial and janitorial supervision and provide all needed utility services and attempt to be of aid in any other respects you might desire. The Board still owns some school buses, and perhaps a plan for making them available could also be perfected.

If this proposal will be of assistance to you and you desire to avail yourself of it, representatives of the Board will be happy to meet with representatives of your Association to perfect the details. I would think that the sooner we get started the better. An early conference can be arranged by communicating either with me, Mr. T. J. McIlwaine, Division Superintendent of Schools, Farmville, Virginia, or our counsel, Mr. Collins Denny, Jr., Travelers Building, Richmond, Virginia.

Very truly yours,

W. Edward Smith, Chairman, Prince Edward County School Board.

[fol. 209] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
AT RICHMOND
Civil Action No. 1333

EVA ALLEN, et al., Plaintiffs,

v.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, VIRGINIA, et al., Defendants.

ORDER DENYING MOTION OF UNITED STATES TO INTERVENE AS PARTY PLAINTIFF AND TO ADD PARTIES DEFENDANT—July 5, 1961

This cause came on to be heard upon the motion of the United States to intervene as a plaintiff and to add defendants, and upon the written briefs and argument of counsel; upon a consideration of all of which, for the reasons stated in an opinion of the Court filed in this case on June 14, 1961, it is

Ordered that the motion of the United States to intervene as a party plaintiff and to add as parties defendant the Prince Edward School Foundation, the Commonwealth of Virginia, and Sidney C. Day, Jr., Comptroller of Virginia, is denied.

Oren R. Lewis, United States District Judge, Richmond, Virginia, July 5, 1961.

We ask for this:

Collins Denny Jr., Of Counsel for the School Board and Division Superintendent of Schools of Prince Edward County.

[fol. 210] F. N. Watkins, Com. Atty. Prince Ed. County, Va.

J. Segar Gravatt, Of Counsel for the Board of Supervisors of Prince Edward County.

Frederick T. Gray, Of Counsel for the Superintendent of Public Instruction and the State Board of Education.

Seen:

S. W. Tucker, Of Counsel for Plaintiffs.

H. John Barrett, Of Counsel for the United States.

[fol. 211] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

Civil Action No. 1333

EVA ALLEN, et al., Plaintiffs,

v.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, et al., Defendants.

ORDER DENYING MOTIONS TO DISMISS SUPPLEMENTAL COMPLAINT, ETC.—July 7, 1961

This cause came on to be heard upon the motions to dismiss the amended supplemental complaint and upon the written briefs and argument of counsel; upon a consideration of all of which, for the reasons stated in an opinion of the Court filed in this case on June 14, 1961, it is

Ordered that the motions to dismiss are denied, without prejudice to the rights of the defendants or any of them to renew their motions upon the conclusion of the hearing if they are then so advised; and it is further

Ordered that the defendants shall file their answer and/or other responsive pleadings to the amended supplemental

complaint within twenty days from June 14, 1961, and that pre-trial procedures as provided and scheduled in said memorandum be observed by counsel for all parties, and that this cause be heard on its merits on July 24, 1961, at 10:00 o'clock A. M., E. D. S. T.

The Court, being requested to do so, notes the retirement of Oliver W. Hill, Esquire, Spottswood W. Robinson, III, Esquire, and Frank D. Reeves, Esquire, from this case as counsel for the plaintiffs.

Oren R. Lewis, United States District Judge, July 7, 1961.

[fol. 212] We ask for this:

S. W. Tucker, Of Counsel for Plaintiffs.

Seen and objected to:

Collins Denny Jr., Of Counsel for the County School Board of Prince Edward County and Division Superintendent of Schools.

Frank N. Watkins, Commonwealth Attorney.

J. Segar Gravatt, Of Counsel for the Board of Supervisors of Prince Edward County and J. W. Wilson, Treasurer.

Frederick T. Gray, Of Counsel for State Board of Education and Superintendent of Public Instruction.

[fol. 213]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION
Civil Action No. 1333

EVA ALLEN, et al.

v.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, VIRGINIA, et al.

July 24-27, 1961

TRANSCRIPT OF TRIAL PROCEEDINGS

Before Honorable Oren R. Lewis, District Judge.

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[fol. 213a] MARY R. CHEATHAM, called as a witness by the plaintiffs and being first duly sworn, testified as follows:

Direct examination.

By Mr. Carter:

Q. Is this Miss or Mrs. Cheatham?
A. Mrs.
Q. Mrs. Cheatham, where do you live?
A. In Farmville.
Q. What do you do?
A. I am the agent for the Board of Supervisors of Prince Edward County.
Q. As agent for the Board of Supervisors of Prince Edward County, what do you do?
A. I accept, process, and generally am in charge of the [fol. 213b] applications for educational grants for the children of Prince Edward County.

Q. That is, the applications for educational grants that are paid by the Board of Supervisors pursuant to the ordinance which has been introduced?

A. Yes, sir.

Q. Now, do all applications come through your office?

A. All county applications come through my office.

Q. All applications for funds of the Board of Supervisors come through your office?

A. Yes, sir.

Q. I will show you Plaintiff's Exhibit No. 18 and ask you if that is the application?

A. Yes, sir.

Q. Mrs. Cheatham, how many applications were received through your office during the year of '59-60?

A. I will have to make an estimate on that. I do not have the exact figure in my head. I will be able to give that to you tomorrow morning. My estimate is approximately 1,360-odd.

Q. I gave it to you for '59-60.

A. Oh, I'm sorry. There were none. The office did not [fol. 213c] exist.

Q. Your office was established—

A. In August.

Q. Of '60?

A. Yes.

Q. So that the 1,300-odd would be for the year 1960-61?

A. That is correct.

Q. Are these applications made once a year for the school year, or are they made for the semester?

A. They are made once a year for a school year.

Q. Is the application made for the amount of the tuition grant? Is the amount $50, or $100?

A. I do know that amount, yes, sir. The amount was put no less than $100 per child for the school year.

By the Court:

Q. You say the amount was put no less than $100?

A. Yes, sir, for the school year.

Q. If it was not put any less, what was the maximum of it?

A. There was no maximum listed. It was within the discretion of the Board of Supervisors.

Q. What was the amount granted for 1960-61?

A. It was $100 per year per child.

[fol. 213d] By Mr. Carter:

Q. This Exhibit No. 18 which I have shown you, are these applications kept on file in your office?

A. Yes.

Q. If I were a parent or guardian of a child desiring to qualify, I would come to your office and pick up one of these applications?

A. Yes, sir.

Q. I would fill it out?

A. Yes, sir.

Q. And I would leave it with you?

A. You would sign it in front of me or another notary, and then return it to me.

Q. After I fill it out pursuant to instructions, what do you do?

A. I take it, I check the name of the school listed to make sure that the child will be enrolled in a school or system of education; I satisfy myself through whatever channels are available that the child is properly enrolled, and pass it on to the board with my approval or disapproval.

Q. Let's take something specific. It is no secret that I am interested in these applications with respect to the Prince Edward School Foundation. I want to qualify. I [fol. 213e] have filled this out and under the name of the school I have listed "Prince Edward Foundation."

A. First, if the application has been filled out before school is open, I can do nothing. As soon as school is open, I check the names of those enrolled against the number in school. I check those against the applications made by the parents to make sure the child is enrolled in school. If they are, then they might be found to qualify.

Q. Do you have a list of children for whom educational grants were approved to attend the Prince Edward County Educational Foundation?

A. I have all of those that were approved by the County.

Q. Will you be able to have them tomorrow morning?

A. Yes, sir, I will have them tomorrow morning.

Q. Do you have any idea, with any accuracy, of these 1,300 or so applications, as to how many were for the Prince Edward School Foundation?

A. Yes, sir; all but five.

Mr. Carter: All but five. I think that is all.

[fol. 213f] Cross examination.

By Mr. Gravatt:

Q. Mrs. Cheatham, suppose a parent came to you and listed a child as being taught by a certain individual in a certain school run by the Prince Edward Christian Council. What would you do with that application?

A. I would accept it and recommend it for approval.

Q. What investigation, if any, would you make of the school and the enrollment?

A. The enrollment of the school?

Q. The enrollment of the child.

A. I would talk with the parent to see if the child were enrolled at that school.

Q. Would you recommend such an application?

A. Yes, sir.

Mr. Gravatt: That is all.

By the Court:

Q. Mrs. Cheatham, this Christian Foundation, or whatever the technical name of it is, did you receive any such applications for that institution?

A. No, sir, I did not.

Q. Is there such an institution in Prince Edward, to your knowledge?

[fol. 213g] A. To my knowledge, there is a school there run by the Prince Edward Christian Association.

Q. What kind of school is it?

A. I don't know. I never had occasion to take one for it, Judge.

Q. Well, is it one operating ten hours a day, or is it a summer school?

A. I know nothing about it.

Q. If you knew nothing about it—

A. I would inquire first and then make my recommendation.

Q. That is my point.

A. I'm sorry.

Q. I understood you to say you would recommend a grant to that institution.

A. Yes, sir. I would have to inquire into the institution first.

Q. If the school, after you had investigated it fully, did not meet the requirements set forth in the ordinance itself, what would you do?

A. I would have no choice but to disapprove the application if it did not meet the requirements.

Q. Well, have you made any investigation privately or as a representative of the County Board to determine [fol. 213h] whether or not, in fact, there are any other educational facilities in Prince Edward that have complied with the requirements of the County Board ordinance, other than the Prince Edward Foundation?

A. No, sir, I have not.

The Court: Thank you. Stand down.

The Court: Call your next witness.

* * * * * * *

[fol. 214] Mrs. Mary Cheatham, recalled by the plaintiffs, further testified as follows:

Direct examination.

By Mr. Carter:

Q. Mrs. Cheatham, you recall that on yesterday you were asked about the number of applications for educational grants?

A. Yes, sir.

Q. And you gave me an approximation and indicated that you would give it exactly. Are you able to give us that exact figure?

A. Yes, sir. The exact figure is 1,363.

Q. Am I correct that of that 1,363 all but 5 were for education at the Prince Edward School Foundation?

A. Yes, sir.

Q. And that all of them received from the county the $100 educational fund?

A. There were a few exceptions to all of them receiving it because of the length of time in which they were enrolled in school, but they were given a proportionate sum of it.

By the Court:

Q. They received $100 per year if they went right in? [fol. 215] A. If they went right in, yes, sir.

Mr. Carter: Thank you. That is all.

Mr. Gravatt: Mr. Carter, you asked for certain records that this lady keeps.

Mr. Carter: Yes, sir.

Mr. Gravatt: We have those records here if you want to look at them.

Mr. Carter: I think Mrs. Cheatham supplied the figures.

Mr. Gravatt: And you don't want the records?

Mr. Carter: No.

Cross examination.

By Mr. Gravatt:

Q. Mrs. Cheatham, do you have a copy of the application blank for a tuition grant?

A. No, sir, not with me.

Q. Is there one here?

Mr. Carter: It is an exhibit.

The Court: It is an exhibit in evidence.

By Mr. Gravatt:

Q. You are an employee of the Board of Supervisors of Prince Edward County; is that correct?

A. Yes, sir.

[fol. 215a] Q. In your capacity as agent of the Board of Supervisors—that is what you have been designated, I believe?

A. Yes, sir.

Q. In that capacity, what responsibility do you have in the administration of the educational payment ordinance?

A. As the agent for the Board, I am responsible for the administration of all the grants. They are made out sometimes by the parents; sometimes they are made out in my presence. I am authorized to help them if it is necessary. I am also a notary, which is necessary in the application.

Q. In filling out this form and in administering this act, if a parent comes to your office, you present one of these form to the parent and, if they ask your assistance, you assist in filling it out; is that correct?

A. Yes, sir.

Q. Among the questions on here, number one is the name of the child, birth date, residence, and things of that nature; number two, name and address of the parent, guardian, or person *in loco parentis;* number 2-A, if applicant is not a parent, give name and address of parent; 3, name and [fol. 216] address of school last attended or place of instruction; 4, name of school in which child is to be enrolled or person offering such course of instruction or training within Prince Edward County.

Now, when you got down to this No. 4, was it necessary that No. 4 be filled in that it be any system of schools or any system of instruction where a child would be going to school from the first grade, say, to high school, or was it simply necessary that there be some person who was giving instruction to a child or children?

The Court: Well, doesn't the ordinance answer that question? Doesn't the ordinance itself specify when and under what conditions the grant would be approved?

Mr. Gravatt: No, sir, I don't think it specifies all of that. It is broad, but I think there are certain areas in the administration of the ordinance that should be developed from this witness, and that is what I am trying to do.

The Court: You can ask her what she has been doing and we will consider that—I mean, how she has been interpreting it.

By Mr. Gravatt:

Q. Is it necessary that anything more be stated than [fol. 217] a responsible teacher for a child or children, teaching them, in order to make this application?

A. No, sir. My instructions from the Board of Supervisors were to investigate and to assure and satisfy myself that it was an honest effort to train and educate the children or a child. It could be four or five children, as long as it was an honest effort. That was my instructions from the Board of Supervisors.

By the Court:

Q. Whom did you get those instructions from?

A. I received those instructions fom the Board of Supervisors when I was hired.

Q. Are they in writing?

A. No, sir, they are oral.

Q. You didn't copy them down?

A. I may have a notation of my own, but they were not formal written instructions.

By Mr. Gravatt:

Q. Now, the next question: "If this is a public school located outside of Prince Edward County, state name and address and the amount of tuition to be charged."

The next question on here is No. 5. And this application has to be sworn to; is that correct?

A. Yes, sir, it must be signed and sworn to.

[fol. 218] Q. No. 5: "The undersigned is legally responsible for the care of the child for whose benefit the application is made; that said child has attained the age of six years and has not attained the age of twenty years; that the said child is a bona fide resident of Prince Edward County, Virginia and is educable; that the said child on whose behalf the application is filed will be enrolled in

either a private non-sectarian elementary or secondary school within the County of Prince Edward, Virginia, or in a public school located within the State of Virginia wherein tuition is charged in at least the amount of the grant applied for; that the child is not detained or confined in any public institution; that the said child is or will be enrolled during the school year for which the application is made; that the child has not graduated or completed the course of study offered at the high school level."

Was this application entertained if the child or the child's parents stated that the child would be enrolled for instruction by some person, firm, or corporation giving instruction within the county?

A. I didn't get that, I'm sorry.

Q. Was the application entertained—

A. Yes, sir.

[fol. 219] Q. —if the parent simply certified—

A. Yes, sir.

Q. —that the child would be enrolled—

A. Yes, sir.

Q. —with a person, firm or corporation offering some kind of educational training?

A. Yes, sir.

Q. In accordance with question No. 5 of the application?

A. Yes, sir.

Q. Now, No. 6: "The undersigned agrees to refund any grants made under the ordinance to provide funds for educational purposes adopted on 18th day of July, 1960, as provided therein if such child fails to attend school for 150 days unless excused by the Board of Supervisors, of said county."

Now, the point has been made here that certain schools may not have been eligible for these grants because they did not teach for 180 days. My question to you is. This application does not require a parent to certify that the school teaches for 180 days, does it?

A. No, sir.

Q. And all you required was that the child be enrolled and that you satisfy yourself in an honest, bona fide effort [fol. 220] was being made for a responsible person to educate the child?

A. Yes, sir.

Q. And the only additional thing that was required was that they certify that they would refund, subject to an excuse from doing so by the Board of Supervisors, if they did not attend school for 150 days?

A. Yes, sir.

Q. Now, upon your investigation, after receiving that blank filled in that way, what investigation would you make, if any, of the applicant in order to make your recommendation on the application?

A. Well, on the back there is a place where it has to be signed by me before being turned over to the Board of Supervisors, to be approved or disapproved. It was my responsibility to investigate the schools, the course of instruction, the teacher, whatever association or organization was handling the education or training of the children. If in my opinion after examining it as closely as I could I felt that it was an honest effort to train these children, no matter what type of school it was, I then handed it to the Board of Supervisors with my recommendation for approval for the first half of the payment of the grant. It was my under- [fol. 221] standing that I was to be as lenient as possible, because in our county now we are most anxious to get as many children educated as possible, and I was to regard this as leniently as possible until the first payment, and if I felt after the first payment that it was an effort to defraud, an effort to gain money without using it, then I put my disapproval on the application; but that was not final. I had to take it to the Board to explain the circumstances—what I had found out about the courses of training, and the teachers and the parents. I give them all the information I can. At that time they take it under consideration. They either go along with my approval, or rather my disapproval, and then they disapprove that application. If they disapproved, the applicant then, the parent or guardian, had a chance to appeal before the Board and also before the Court, if they felt that they were being treated unfairly. Of course, my disapproval was very properly overruled—had it ever occurred, it could have been very properly overruled. It could have been felt there were

mitigating circumstances that I could not see. It was their decision as far as I was concerned.

Q. So that in the administration of this ordinance the policy of the Board of Supervisors as applied by you was to make this money available to any person, guardian, or [fol. 222] parent who had his child in a course of instructional training in a good-faith, honest effort to try to do something to help that child educationally?

A. That is correct.

Q. And this money was available and it was the policy of the Board to make it available to people in that situation regardless of whether they had a formal school, or formal building, or formal grades, or that the teachers were accredited by the State Department, or that their surroundings were safe and sanitary—it was an effort to help people who in good faith were undertaking to serve the need of the county to educate children of any race?

A. That is right.

Mr. Gravatt: That is all.

By Mr. Denny:

Q. Mrs. Cheatham, is there any difference in the procedures when an application comes from the parent or guardian of a Negro child than the procedures adopted when it comes from the parent or guardian of a white child?

A. No, sir.

Q. You have had applications made by parents or guardians of Negro children?

A. Yes, sir.

Q. Have they been granted?

[fol. 223] A. Yes, sir; all of the applications for Negro children that my office has received have been granted.

Mr. Denny: Thank you.

Redirect examination.

By Mr. Carter:

Q. Mrs. Cheatham, the applications that were approved were 1,358, I believe?

A. 1,363.

Q. I am leaving out the five that did not go to the Prince Edward School Foundation. Those 1,358 were credited to a full-time, 180-day school?

A. Yes, sir.

Q. What about the five?

A. The five that went to public schools located within the State of Virginia.

Q. So there has not been across your desk or approved by you any educational grants for anybody to go to anything but an authorized and formal school?

A. I cannot approve what I do not receive.

Mr. Carter: That is all.

Mr. McIlwaine: No further questions.

By the Court:

Q. Do I understand, Mrs. Cheatham, that any person in [fol. 224] Prince Edward County, colored or white, who came in and told you that they were sending their child to be tutored or taught by an individual in Prince Edward County would get the $100?

A. Sir, if they came to me and told me they were sending their child to a person to be tutored, if it was an honest effort, I would naturally have some investigation to make.

Q. What kind of investigation would you make?

A. I make sure that the person doing the training is honestly trying to help educate the child.

Q. Well, a mother undertakes to educate a child, and it is a very successful effort, is it not?

A. Yes, sir.

Q. Is she eligible to get $100 if she is conscientiously trying to get the child to read and write and do a lot of other things? If she were highly conscientious and desirous of having her child learn to read and write, would she get the $100?

A. Well, my decision, of course, would not be final. I would say—

Q. Well, what would your recommendation be?

A. My recommendation would be that if a mother was trying to teach her child, there would be no expense in-
[fol. 225] volved and there would be no need for it, for an educational grant, but there would probably be an expense—

Q. What do you mean by "expense"?

A. There are certain expenses that a mother has in the process of educating a child. There are the costs of books, the costs of materials—a mother would have the cost of books if she were trying to teach her child to read, Judge. Then, if it were an honest effort to educate her child or her children, I would assume it would be an honest effort and I would give my approval, at least.

Q. Well, obviously, regardless of how conscientious the mother was, I doubt if she could equal the efforts of an accredited school in teaching the child, particularly in high school classes; regardless of how competent she was, I doubt that she could do it, but she would still be conscientious. This money, or this act was never created, was it, to give a substitute of that type for an educational system?

A. No, sir. The understanding would be that a person or association or organization would be offering this course of training or school to a group. Now, the group could be small.

Q. I am not talking about the size, but would the teachers have to have any minimum standards, any minimum
[fol. 226] qualifications, to be a person whom you might consider to be competent to teach children?

A. My instructions were that there did not have to be accredited, qualified teachers.

Q. And these children would get $100 by applying for it, regardless of their ability to teach?

A. That would be a part of my responsibility, to investigate to see if they were actually being taught, and being taught in a manner that was educational. I would have to examine that more closely.

Q. Well, let us assume they were being taught. Do you have any standards to apply to this applicant or this teacher that is going to try to teach ten people?

A. Well, I am a little familiar with the education of children; I have taught in public schools myself; I have a general idea of what is education for a child, whether they are being taught reading, writing, or arithmetic, fundamentals of education, fundamentals for learning, teacher-learner relationship.

Q. Well, are you authorized to determine whether the curriculum is sufficient to justify the payment of this amount?

A. In the case of a small organization such as you are talking about now, one teacher and ten children, I am au-
[fol. 227] thorized to make my decision. I bring it to the Board to evaluate, with my recommendation that I think it is an honest effort, an honest endeavor to train these children and give them the fundamentals of education. Then it would have received my approval.

Q. Well, as the agent of the Board, in the administering of the fund, what have you done to notify the people that they can get this money under the circumstances?

A. I personally put articles in the local newspaper.

Q. Do you have any of those articles?

A. I have them, but not with me, sir.

Q. And those articles, in substance, tell the public—

A. That they are open for children attending private schools or courses of instruction.

Q. "Private school" has a meaning. If you have any of those articles that have been printed, if you can make them available, the Court would appreciate it, but I don't want to put you to any trouble to find them.

A. I would have to go back to Farmville.

Q. You have not made a single grant—

A. No, sir.

[fol. 228] Q. —other than to students attending public schools outside of the county and those attending the Foundation?

A. That is right.

Q. Now, if it was the policy of the Board, and your duty as the agent thereof, to see that this money was used for the education of all the children in the county, why didn't you go out and at least try to get more of these private

schools organized, or do something to correct the situation of the children who were not, in fact, being educated?

A. As agent for the Board, I felt myself in the position, sir, where I did not feel it was up to me to connect myself with the forming of an educational group, though I do know, because of people who have come to me directly, who have tried to do this, who have tried to form a school somewhat along this line, and I was asked at that time, if such an occasion arose, that they were able to do it, would I come and explain the purposes of the educational grant, and I told them I would come at any time to any place and explain the purposes of the educational grant offered by the county, but I did not feel that I was in a position to try to promote an educational group, as a county employee.

[fol. 228a] Q. Well, I don't mean for you to form it—

A. I just felt that I was not in position to go out and seek it.

Q. You did not attend any church meetings, or PTA meetings, or civic group meetings, of whatever type, then, in the county to advance the possibility of these children being conscientiously educated even on this limited basis?

A. No, sir. I went to a PTA meeting of the Foundation because I was asked to go. I would have gone and, as I said, I told people who tried to organize a school I would go any time.

Q. You went to the PTA meeting for what purpose?

A. To explain the purpose of the educational grant, but I would have been glad to go and do it in the other cases.

Q. Did you explain at that PTA meeting that the students attending the Foundation were eligible for this grant if they filled out the necessary form?

A. Yes, sir.

The Court: That is all.

Mr. Gravatt: You may stand aside.

[fol. 229]

RENEWAL OF MOTIONS AND DEFERRAL OF RULING

Mr. Denny: That will be presented in my argument.

I wish at this time, in addition to the motion just made, to reiterate the motions heretofore made, on which I understand the Court likewise withholds its judgment, but for the sake of the record I reiterate those motions at this time.

The Court: All right. The Court will defer ruling at this time.

[fol. 230] Mr. Gravatt: Will Your Honor remember the record on the motion of the Board of Supervisors heretofore made?

The Court: You mean the motion to dismiss?

Mr. Gravatt: Yes, sir.

The Court: I am going to rule on all issues that are presented in this case by the supplemental complaint and the respective answers, and I would be pleased to hear from all sides, particularly the plaintiffs, and likewise from the defendants, what they contend I ought to do and what evidence to tell me why I ought not to do that and what evidence and law supports it, and I would like for the evidence or lack of evidence and what authority they have in support of their contention that I ought not to do what the plaintiffs are asking to have done. In other words, this is a full hearing of all the allegations and all of the contentions, whatever they might be, raised by the pleadings in the Prince Edward case.

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[fol. 231] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division
Civil Action No. 1333

EVA ALLEN, et al., Plaintiffs,

v.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, VIRGINIA, et al., Defendants.

MOTION OF DEFENDANTS BOARD OF SUPERVISORS OF PRINCE EDWARD COUNTY, VIRGINIA, AND J. W. WILSON, JR., TREASURER OF PRINCE EDWARD COUNTY, VIRGINIA, TO DISMISS THE INJUNCTION ENTERED HEREIN ON NOVEMBER 16, 1961, AND FURTHER EXTENDED BY ORDER OF , 1962—Filed May 1, 1962

Now come the Board of Supervisors of Prince Edward County, Virginia, and J. W. Wilson, Jr., Treasurer of Prince Edward County, Virginia, and without waiving their several motions heretofore filed which remain undetermined but severally renewing and insisting upon the same, move the Court as follows: That the injunction entered herein on November 16, 1961, and extended by order of , 1962, be dismissed because:

1. The reasons set forth in the Motion of all defendants this day filed to dismiss the Amended Supplemental Complaint and the Motion of plaintiffs for Further Relief, or in the alternative to abstain from exercising jurisdiction over the same pending submission of the federal questions to the Supreme Court of Appeals of Virginia, directs attention to the conduct on behalf of some plaintiffs and counsel for all plaintiffs which should not be countenanced by a court and which requires that the temporary injunction entered by said orders aforesaid be dismissed.

2. It has now authoritatively been decided by the Supreme Court of Appeals of Virginia that no provision of the Constitution of the Commonwealth of Virginia and no provision of her statutes lay any duty or obligation upon the Board of Supervisors of a county to appropriate moneys [fol. 232] for the operation and maintenance of public schools within the county. These defendants aver that there is no provision of the Constitution of the United States requiring that the Board of Supervisors of Prince Edward County, Virginia, appropriate any money for the maintenance and operation of public schools within the County. These defendants further aver that there is no provision of the Constitution of the United States which forbids the Commonwealth of Virginia from making provision for the education of her children by way of tuition grants payable to the parents of the children to aid in meeting the expenses of the children in attending the school of the parent's or child's choice; and there is no provision of the Constitution of the United States which forbids the Board of Supervisors of Prince Edward County from making similar provision and from granting tax credits for contributions to private nonsectarian schools within the County.

3. The injunction of this Court improperly forbids the exercise of rights which are not in violation of either federal or state law save upon a condition which is not imposed by federal or state law and under such conditions no injunction should be granted.

4. The Constitution of the United States guarantees to parents the right to choose the schools in which their children are educated. The payment of public funds in furtherance of such constitutionally protected freedom does not violate, but is protected by the Constitution of the United States. The order of the Court enjoining the payment of such funds is, therefore, an infringement of a constitutionally protected freedom and to that extent itself violates the Constitution of the United States.

Board of Supervisors of Prince Edward County, Virginia, and J. W. Wilson, Jr., Treasurer of Prince Edward County, Virginia, By J. Segar Gravatt, Of Counsel.

J. Segar Gravatt, Blackstone, Virginia.

[fol. 233] Frank N. Watkins, Watkins and Brock, Farmville, Virginia, Counsel for Board of Supervisors of Prince Edward County, Virginia, and J. W. Wilson, Jr., Treasurer of Prince Edward County, Virginia.

Certificate (omitted in printing).

[fol. 234] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

Civil Action No. 1333

EVA ALLEN, et al., Plaintiffs,

v.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, VIRGINIA, et al., Defendants.

MOTION OF DEFENDANTS COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, VIRGINIA, AND T. J. MCILWAINE, DIVISION SUPERINTENDENT OF SCHOOLS TO DISMISS THE AMENDED SUPPLEMENTAL COMPLAINT FOR FAILURE OF PROOF—Filed May 1, 1962

Now comes the County School Board of Prince Edward County, Virginia, and T. J. McIlwaine, Division Superintendent of Public Schools, two of the defendants herein, and without waiving their several motions heretofore filed which remain undetermined, but severally renewing and insisting upon the same, move the Court to dismiss the Amended Supplemental Complaint as to them on the ground that the only allegation therein contained against them or either of them has been judicially determined by the Court to be unsupported in fact.

In support of said motion, the defendants show the following:

1. The Amended Supplemental Complaint contains no allegations against the defendant T. J. McIlwaine, Division Superintendent of Public Schools.

2. The only allegation in the Amended Supplemental Complaint against the County School Board of Prince Edward County is found in paragraph 16 of the Amended Supplemental Complaint. There the plaintiffs allege on information and belief that the defendant County School Board of Prince Edward County, Virginia, "is considering and contemplating the conveyance, lease, or transfer of the public schools and public school property of Prince Edward County * * *."

[fol. 235] 3. After hearing evidence *ore tenus*, the Court, by order entered November 16, 1961, held that there was no evidence to support said allegation against the defendant County School Board of Prince Edward County, Virginia, and the relief prayed for by plaintiffs was denied.

4. For the foregoing reasons, the said defendants move that they be hence dismissed with their costs in and about this cause expended.

County School Board of Prince Edward County, Virginia, and T. J. McIlwaine, Division Superintendent of Schools, By John F. Kay, Jr., Of Counsel.

Collins Denny, Jr., John F. Kay, Jr., Denny, Valentine & Davenport, 1300 Travelers Building, Richmond 19, Virginia.

C. F. Hicks, DeHardit, Martin & Hicks, Gloucester, Virginia, Counsel for defendants County School Board of Prince Edward County, Virginia, and T. J. McIlwaine, Division Superintendent of Schools.

Certificate of service (omitted in printing).

[fol. 236] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION
Civil Action No. 1333

EVA ALLEN, et al., Plaintiffs,

v.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, et al., Defendants.

NOTICE OF APPEAL—Filed November 7, 1962

Notice is hereby given that the Board of Supervisors of Prince Edward County and J. W. Wilson, Jr., Treasurer of Prince Edward County, do hereby appeal to the United States Circuit Court of Appeals for the Fourth Circuit the order entered in the above styled case on the 10th day of October, 1962 and so much thereof:

1. As makes final the action of the Court in refusing to grant the several motions filed on behalf of the Board of Supervisors of Prince Edward County to dismiss the Amended Supplemental Complaint as to it.

2. As makes final the action of the Court in refusing to grant the several motions of the Board of Supervisors of Prince Edward County that the Court abstain from a determination of the questions of State Statutory and Constitutional construction as set forth in said motion and direct the plaintiffs to procure a final adjudication thereof in the State Court of Last Resort in light of the requirements of the Constitution of Virginia and in light of the requirements of the Constitution of the United States.

3. As enjoins the payment of monies as provided by county ordinance and State law to parents or persons in

loco parentis for the education of children residing in Prince Edward County.

4. As enjoins upon the condition ("so long as public schools remain closed") the payment of monies as provided by county ordinance and State law to parents or to [fol. 237] persons in loco parentis for the education of children residing in Prince Edward County.

5. As enjoins the Treasurer of Prince Edward County, his agents and employees, from allowing tax credits as provided by ordinance adopted July 18, 1962.

6. As is a final and appealable order holding that public schools may not be closed in Prince Edward County so long as such schools are operated in other counties and cities of the Commonwealth.

Frank Nat Watkins, Commonwealth's Attorney of Prince Edward County.

J. Segar Gravatt, Counsel for the Board of Supervisors of Prince Edward County and J. W. Wilson, Jr., Treasurer of Prince Edward County.

Certificate of service (omitted in printing).

[fol. 238] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION
Civil Action No. 1333

EVA ALLEN, et al., Plaintiffs,

v.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, VIRGINIA, et al., Defendants.

NOTICE OF APPEAL—Filed November 7, 1962

Notice is hereby given that the County School Board of Prince Edward County, Virginia, and T. J. McIlwaine, Division Superintendent of Schools of said County, hereby appeal to the United States Court of Appeals for the Fourth Circuit:

1. From the orders of this Court entered in the above-captioned case on October 10, 1962, in that:

A. The Court in said orders did not but should have sustained the motions of these defendants filed May 1, 1961, to dismiss the Amended Supplemental Complaint. By considering said Amended Supplemental Complaint and entering said orders of October 10, 1962, which are final in some particulars, the Court perpetuated and made final its order of September 16, 1960, permitting the plaintiffs to file a Supplemental Complaint and its order of April 24, 1961, permitting the plaintiffs to file an Amended Supplemental Complaint, and in effect overruled the said motions of these defendants filed May 1, 1961, to dismiss the Amended Supplemental Complaint, which said motions were overruled by order of July 7, 1961, without prejudice to the right to renew the same upon conclusion of the

hearing set for July 24, 1961, and which said motions were renewed at the conclusion of said hearing (See Transcript of Trial Proceedings, July 24-27, 1961, Vol. II, page 513), and which said motions were further renewed as a part of the motion of these defendants [fol. 239] to dismiss the Amended Supplemental Complaint for Failure of Proof filed May 1, 1962.

B. The Court in said orders did not but should have sustained the motion of these defendants filed May 1, 1962, to dismiss as to them the Amended Supplemental Complaint for Failure of Proof. By considering said Amended Supplemental Complaint and entering said order of October 10, 1962, which is final in some particulars, the Court in effect overruled said motions.

2. From so much of the orders of this Court entered in the above-captioned cause on October 10, 1962:

A. As overrules the motion of these and other defendants filed May 1, 1962, to dismiss the Amended Supplemental Complaint or in the alternative to abstain from exercising jurisdiction over the same until the Supreme Court of Appeals of Virginia has had submitted to it and has had opportunity to decide the question set forth in this Court's opinion of August 23, 1961, and in its order of November 16, 1961, and which said motion was also incorporated in a motion to rehear and reconsider and to abstain filed October 3, 1962.

B. As overrules the said motion of these and other defendants filed October 3, 1962, to rehear, reconsider and abstain.

C. As enjoins the Board of Supervisors of the County and the County Treasurer, their respective agents and employees from approving and paying out any county funds authorized by the "Grant in Aid" Ordinance adopted July 18, 1960; and as enjoins the Division Superintendent of Schools of Prince Edward County, the Superintendent of Public Instruction, their agents, employees and all persons working in concert

with them, from processing or approving applications for State scholarship grants from persons residing in Prince Edward County.

[fol. 240] D. As holds that the public schools of Prince Edward County may not be closed to avoid the effect of the law of the land as interpreted by the Supreme Court while the Commonwealth of Virginia permits other public schools to remain open at the expense of the taxpayers, if this portion of said orders has such finality as permits appeal.

Collins Denny, Jr., of Counsel for Defendants, County School Board of Prince Edward County, Virginia, and T. J. McIlwaine, Division Superintendent of Schools of said County.

Collins Denny, Jr., John F. Kay, Jr., Denny, Valentine & Davenport, 1300 Travelers Building, Richmond 19, Virginia.

C. F. Hicks, DeHardit, Martin & Hicks, Gloucester, Virginia, Counsel for Defendants, County School Board of Prince Edward County, Virginia, and T. J. McIlwaine, Division Superintendent of Schools of said County.

Certificate of service (omitted in printing).

[fol. 241]

IN UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 8837

COCHEYSE J. GRIFFIN, MIGNON D. GRIFFIN, NAJA D. GRIFFIN and L. FRANCIS GRIFFIN, JR., infants, by and through L. FRANCIS GRIFFIN, SR., their father and next friend, OSA SUE ALLEN and ADA D. ALLEN, infants, by and through HAL EDWARD ALLEN, their father and next friend, TOBY HICKS, CARL HICKS, GREGORY HICKS, BOYCE U. Z. HICKS and JOHN HICKS, infants, by and through C. W. HICKS, their father and next friend, BETTY JEAN CARTER, an infant, by and through JAMES L. CARTER, her father and next friend, DOROTHY MAE WOOD, an infant, by and through SPENCER WOOD, JR., her father and next friend, JACQUELYN REID, an infant, by and through WARREN A. REID, her father and next friend, and L. FRANCIS GRIFFIN, SR., HAL EDWARD ALLEN, C. W. HICKS, JAMES L. CARTER, SPENCER WOOD, JR., and WARREN A. REID, Appellants and Cross-Appellees,

versus

BOARD OF SUPERVISORS OF PRINCE EDWARD COUNTY and J. W. WILSON, JR., Treasurer of Prince Edward County; STATE BOARD OF EDUCATION OF THE COMMONWEALTH OF VIRGINIA and WOODROW W. WILKERSON, Superintendent of Public Instruction of the Commonwealth of Virginia and County School Board of Prince Edward County, Virginia, and T. J. MCILWAINE, Division Superintendent of Schools of said County, Appellees and Cross-Appellants.

[fol. 242] Cross-Appeals from the United States District Court for the Eastern District of Virginia, at Richmond. Oren R. Lewis, District Judge.

Argued January 9, 1963.

Before HAYNSWORTH, BOREMAN and J. SPENCER BELL, Circuit Judges.

Robert L. Carter (S. W. Tucker, Henry L. Marsh, III, Barbara A. Morris, Frank D. Reeves, and Otto L. Tucker on brief) for Appellants and Cross-Appellees; Burke Marshall, Assistant Attorney General, (St. John Barrett, Harold H. Greene, and Alan G. Marer, Attorneys, Department of Justice, on brief) for the United States of America as Amicus Curiae; Collins Denny, Jr., (John F. Kay, Jr., C. F. Hicks, Denny, Valentine & Davenport, and DeHardit, Martin & Hicks on brief) for Appellees and Cross-Appellants, County School Board of Prince Edward County and T. J. McIlwaine, Division Superintendent of Schools of said County; J. Segar Gravatt, Special Counsel for the Board of Supervisors of Prince Edward County, (Frank Nat Watkins, Commonwealth's Attorney of Prince Edward County, on brief) for Appellee and Cross-Appellant, Board of Supervisors of Prince Edward County; R. D. McIlwaine, III, Assistant Attorney General of Virginia, and Frederick T. Gray, Special Assistant Attorney General of Virginia, (Robert Y. Button, Attorney General of Virginia, on brief) for Appellees and Cross-Appellants, State Board of Education and Superintendent of Public Instruction of the Commonwealth of Virginia.

[fol. 243]

OPINION—August 12, 1963

HAYNSWORTH, Circuit Judge:

Transmuted, this old case, in its new flesh and pregnant with questions, comes again before us.

As Davis, et al., v. County School Board of Prince Edward, et al., it began in 1951 as a suit to effect the desegregation of the public schools maintained by Prince Edward County, Virginia. It was one of the four school cases decided by the Supreme Court of the United States in Brown v. Board of Education, 347 U. S. 483. As Allen, et al. v. County School Board of Prince Edward County,

Virginia, et al., the case was again before this Court in 1957[1] and, still again, in 1959.[2]

In our opinion filed in May 1959, when this case was last here, we directed the entry of an injunction requiring the then defendants to receive and consider, on a nondiscriminatory basis, applications by Negro pupils for enrollment in high school for the school term beginning in September 1959. We also directed the entry of an order requiring the School Board to make plans for the elimination of discrimination in the admission of pupils to the elementary schools at the earliest practicable date. On remand to the District Court, no order was entered until April 22, 1960, when the District Court entered a formal order requiring the immediate elimination of discrimination in the admission of Negro applicants to high schools and the formulation of plans for the elimination of discrimination in the admission of applicants to elementary schools. Meanwhile, however, all public schools in Prince Edward County had been closed.

[fol. 244] During the summer of 1959, the Board of Supervisors of Prince Edward County, though it had received from the School Board budgets and estimates of the cost of operating the schools for the 1959-60 school year, did not levy taxes or appropriate funds for the operation of the schools during that year. Though certain funds have come into the hands of the School Board, out of which it has been able to meet certain maintenance and insurance expenses and debt curtailment, it has received no funds with which it could operate the schools, for, annually, the Board of Supervisors has failed, or declined, to levy taxes or appropriate funds for the operation of the schools.

In September 1960, the present plaintiffs obtained leave to file a supplemental complaint, which was supplanted by an amended supplemental complaint filed in April 1961. By these supplemental pleadings, the County Board of Supervisors, the State Board of Education and the State Superintendent of Education were brought in as additional defendants. By the amended supplemental complaint, the

[1] 249 F.2d 462.

[2] 266 F.2d 507.

plaintiffs sought an order requiring the defendants to operate an efficient system of free public schools in Prince Edward County, forbidding tuition grants to pupils attending private schools practicing segregation, forbidding tax credits to taxpayers for contributions to private schools practicing segregation, and forbidding a conveyance or lease of any property of the School Board of Prince Edward County to any private organization.

The District Court entered an injunction against payment of tuition grants to pupils attending the schools operated by the Prince Edward School Foundation and against the allowance of tax credits by Prince Edward County on account of contributions to that Foundation. Initially, it [fol. 245] abstained from deciding the questions of state law upon which the reopening of the free public schools depended, but, after the plaintiffs had aborted the effort to have the relevant questions decided by the state courts,[3] the District Court undertook to decide them itself. It or-

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[3] The plaintiffs applied to The Supreme Court of Appeals of Virginia for a writ of mandamus to compel the Board of Supervisors to levy taxes and appropriate funds for the operation of public schools. The District Judge saw copies of the pleadings and, apparently, was of the opinion they put in issue all relevant questions. In their printed brief, however, the plaintiffs disclaimed the presence of any federal question, with the result that the court decided only one narrow issue. It held mandamus unavailable because, it concluded, the Board of Supervisors' function was legislative and discretionary, not ministerial, Griffin, et al., v. Board of Supervisors of Prince Edward County, 203 Va. 321, 124 S.E. 2d 227. It did not consider whether or not Virginia or any of its agencies has an affirmative duty to operate free public schools in Prince Edward or whether it can operate public schools elsewhere while those in Prince Edward remain closed. It did not consider many of the questions of state law which underlie those two ultimate questions.

Later the defendants, or some of them, brought an action for a declaratory judgment in the Circuit Court of the City of Richmond. The plaintiffs here were named defendants there, and one of their attorneys was appointed guardian ad litem for the infants. On March 21, 1963 Judge Knowles filed an opinion in which the major questions are resolved in the favor of the agencies and officials of the Commonwealth and county. An appeal has been taken to The Supreme Court of Appeals of Virginia and will be heard in October, a few months hence. See Southern School News, July 1963, Vol. 10, No. 1, page 12.

dered the schools reopened, but postponed the effectiveness of that order pending this appeal. There was no evidence that anyone had any idea the school buildings and property owned by the School Board would be sold or leased, and no order was entered affecting their disposition.

For the District Court to get to the merits, it had to bypass a number of preliminary questions, including the very troublesome question arising under the Eleventh Amendment, all of which are brought up before us. On the merits of each of the three main issues, the parties [fol. 246] advanced innumerable alternate offenses and defenses, but it is obvious that the answer on the merits, in one instance exclusively and in other instances largely, rests upon interpretations of state law. It is also apparent that a proceeding in the state courts will avoid most of the technical procedural difficulties which must be disposed of before the merits can be determined in this action. Under these circumstances, we think the District Court properly decided, in the first instance, that it should abstain from deciding the merits of the principal issue until the relevant questions of state law had been decided by the state courts. We think it should have adhered to its abstention when resolution of the state questions by state courts was delayed because the plaintiffs, themselves, chose to withdraw them from state court consideration. We think too that abstention on the other two issues, where the answers are so closely related to the principal issue, was the proper course. Insofar as there are federal questions present which are independent of state law, as will presently appear, we conclude that the plaintiffs have shown no ground for relief, so that abstention is not inappropriate.

In 1959, after the Board of Supervisors of Prince Edward County failed to levy taxes for the operation of the schools during the school year 1959-1960, a corporation known as Prince Edward School Foundation was organized for the purpose of operating private schools in the county. It was launched by private contributions of $334,712.22. With the receipt of tuition charges[4] and continuing

[4] There were no tuition charges during the first year, 1959-1960. That year all expenses were met out of contributions. Since then tuition has been charged.

private contributions, it has successfully operated primary and secondary schools in Prince Edward County which are [fol. 247] attended solely by white pupils. It has used none of the facilities of the School Board. Until the District Judge enjoined their payment, pupils attending schools of the Prince Edward School Foundation, generally, received tuition grants paid jointly by Virginia and Prince Edward County, which approached but did not equal the tuition charges they had to pay.

Negro citizens of Prince Edward County at first made no effort to provide schools for their children. They declined proffered assistance in such an undertaking. Some of their children obtained admission to public schools in other counties of Virginia and, since 1960, obtained, or were eligible for, tuition grants when they did so. The great majority of Negro children, however, for a time, went with no schooling whatever. Later, certain "training schools" were established and a substantial number of Negro pupils, but far from all, have attended those training schools.

On the principal issue, the question whether the plaintiffs have a judicially enforceable right to have free public schools operated in Prince Edward County, the plaintiffs contend that the closure of the schools, taken either alone or in conjunction with the subsequent formation of the Prince Edward School Foundation and its operation of private schools for white pupils only, was the kind of "evasive scheme" for the perpetuation of segregation in publicly operated schools which was condemned in Cooper v. Aaron, 358 U.S. 1. The United States, as *amicus curiae* advances a different principle, contending that there is a denial of the Fourteenth Amendment's guarantee of equal protection of the laws when the Commonwealth of Virginia suffers the schools of Prince Edward County to re- [fol. 248] main closed, while schools elsewhere in the state are operated.

As to the plaintiffs' contention, it may be summarily dismissed insofar as it is viewed as a contention that the Fourteenth Amendment requires every state and every school district in every state to operate free public schools

in which pupils of all races shall receive instruction. The negative application of the Fourteenth Amendment is too well settled for argument.[5] It prohibits discrimination by a state, or one of its subdivisions, against a pupil because of his race, but there is nothing in the Fourteenth Amendment which requires a state, or any of its political subdivisions with freedom to decide for itself, to provide schooling for any of its citizens. Schools that are operated must be made available to all citizens without regard to race, but what public schools a state provides is not the subject of constitutional command.

The plaintiffs' theory may also be summarily dismissed insofar as it is viewed as a contention that the closure of the schools was a violation of the order of the District Court entered in compliance with the direction of this Court. The injunctive order, entered when the School Board and its Division Superintendent were the only defendants, re- [fol. 249] quired them to abandon their racially discriminatory practices. Without funds, they have been powerless to operate schools, but, even if they had procured the closure of the schools, they would not have violated the order for they abandoned discriminatory admission practices when they closed all schools as fully as if they had continued to operate schools, but without discrimination.

The impact of abandonment of a system of public schools falls more heavily upon the poor than upon the rich. Even with the assistance of tuition grants, private education of children requires expenditure of some money and effort by their parents. One may suggest repetition of the often

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[5] Byrd v. Sexton, 8 Cir., 277 F.2d 418, 425; Kelley v. Board of Education of City of Nashville, 6 Cir., 270 F.2d 209, 228-229; School Board of City of Newport News v. Atkins, 4 Cir., 246 F.2d 325, 327; Avery v. Wichita Falls Independent School District, 5 Cir., 241 F.2d 230, 233; Wheeler v. Durham City Board of Education, M.D.N.C., 196 F.Supp. 71, 80, reversed on other grounds, 309 F.2d 630; Dove v. Parham, E.D. Ark., 181 F.Supp. 504, 513, affirmed in part, reversed in part, 271 F.2d 132; McKissick v. Durham City Board of Education, M.D.N.C., 176 F.Supp. 3, 14; Thompson v. County School Board of Arlington, E.D. Va., 144 F.Supp. 239, affirmed 240 F.2d 59; Briggs v. Elliott, E.D.S.C. (Three Judge Court), 132 F. Supp. 776, 777.

repeated[6] statement of Anatole France, "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread." That the poor are more likely to steal bread than the rich or the banker more likely to embezzle than the poor man, who is not entrusted with the safekeeping of the moneys of others, does not mean that the laws proscribing thefts and embezzlements are in conflict with the equal protection provision of the Fourteenth Amendment. Similarly, when there is a total cessation of operations of an independent school system, there is no denial of equal protection of the laws, though the resort of the poor man to an adequate substitute may be more difficult and though the result may be the absence of integrated classrooms in the locality.

This we held in a different context in Tonkins v. City [fol. 250] of Greensboro, 4 Cir., 276 F.2d 890, affirming 162 F. Supp. 549. Faced with the necessity of desegregating the swimming pools it owned, the City of Greensboro, North Carolina, chose instead to sell them. Upon findings that the sale of the pool, which the City had theretofore reserved for use by white people only, was bona fide, it was held that there had been no denial of the constitutional rights of the Negro plaintiffs, though the pool was thereafter operated on a segregated basis by its private owners.[7]

Similarly, when a state park was closed during pendency of an action to compel the state to permit its use by Negroes on a nondiscriminatory basis, we held that closure of the park mooted the case requiring its dismissal.[8]

Other courts have clearly held that a municipality which had been ordered to desegregate facilities which it had operated, may abandon the facilities without violating the injunctive order or the rights of the Negro plaintiffs.[9] The

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[6] See Griffin v. Illinois, 351 U.S. 12, 23, 76 S.Ct. 585, 593, 100 L.Ed. 891; Hall v. St. Helena Parish School Board, E.D. La. (Three Judge Court), 197 F. Supp. 649, 655.

[7] See also City of Greensboro v. Simkins, 4 Cir., 246 F.2d 425.

[8] Clark v. Flory, 4 Cir., 237 F.2d 597.

[9] Hampton v. City of Jacksonville, 5 Cir., 304 F.2d 319; Gilmore v. City of Montgomery, 5 Cir., 277 F.2d 364; and see Willie v. Harris County, E.D. Texas, 202 F. Supp. 549.

only limitation of the principle is that a municipality may not escape its obligations to see that the public facilities it owns and operates are open to everyone on a nondiscriminatory basis by an incomplete or limited withdrawal from the operation of them. If the municipality reserves rights to itself in disposing of facilities it formerly owned and operated, subsequent operation of those facilities may still be "state action." [10]

[fol. 251] Nothing to the contrary is to be found in James v. Almond.[11] There, the Court had ordered the admission of seventeen Negro pupils into six of Norfolk's schools theretofore attended only by white pupils. Under Virginia's "Massive Resistance Laws," the Governor of Virginia thereupon seized the six schools, removed them from Norfolk's school system and closed them. All other schools in Norfolk and elsewhere in Virginia remained open. It was held, of course, that the statutes under which the Governor acted were unconstitutional, for Virginia's requirement that all desegregated schools be closed while segregated schools remained open was a denial of equal protection of the laws. There was no suggestion that Virginia might not withdraw completely from the operation of schools or that any autonomous subdivision operating an independent school system might not do so.

The decision in Hall v. St. Helena Parish School Board[12] is not a departure from the principle. There, it appeared that, confronted with court orders to desegregate schools in certain parishes in Louisiana, the Governor of that State called an extraordinary session of the Legislature, which enacted a number of statutes designed to frustrate enforcement of the court's orders. One of the statutes provided for the closure of all schools of a parish upon a majority vote of the parishioners. It was accompanied by other statutes providing for the transfer of closed schools to private persons or groups, providing for educational cooperatives and regulating their operations, providing tui-

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[10] Hampton v. City of Jacksonville, 5 Cir., 304 F. 2d 320.

[11] E.D. Va. (Three Judge Court) 170 F. Supp. 331.

[12] E.D. La. (Three Judge Court) 197 F. Supp. 649.

tion grants payable directly to the school and not solely to the pupils and their parents, providing for general [fol. 252] supervision of the "private schools" by the official state and local school boards, and providing, at state expense, school lunches and transportation for pupils attending the "private schools." Construing all these statutes together, as it was required to do, the Court, with abundant reason, concluded that the statutes did not contemplate an abandonment of state operation of the schools but merely a formal conversion of them with the expectation that the schools would continue to be operated at the expense of the state and subject to its controls. Desegregation orders may not be avoided by such schemes, but there is nothing in the *Hall* case which suggests that Louisiana might not have withdrawn completely from the school business. It was only because it had not withdrawn that the statutes which composed its evasive scheme of avoidance were struck down.

The plaintiffs largely content themselves with assertions that closure of the schools was motivated by the filing of our opinion in May 1959, from which it was apparent that the District Court would be required to enter a desegregation order. They emphasize a resolution adopted in 1956 by a predecessor Board of Supervisors expressing an intention to levy no tax and appropriate no funds for the operation of desegregated schools.[13] More broadly, they contend that closure of the schools, with the effect of avoiding the operation of integrated schools, is a violation of the Fourteenth Amendment or of the injunctive order. [fol. 253] Facially, what we have said will dispose of the plaintiffs' contention, but the matter does not necessarily end there. As we have seen, if Virginia or Prince Edward County can be said to be still operating schools through the Prince Edward School Foundation, then the principles of Cooper v. Aaron, 358 U.S. 1, would require a remedial order.[14] If Prince Edward County has not completely with-

[13] One of the questions much debated is whether a court may inquire into the motive of a legislative body when it considers the constitutionality of the legislative body's acts or inaction.

[14] See Hall v. St. Helena Parish School Board, E.D. La. (Three Judge Court), 197 F.Supp. 649; Hampton v. City of Jacksonville, 5 Cir., 304 F.2d 320; City of Greensboro v. Simkins, 4 Cir., 246 F.2d 245.

drawn from the school business, then it cannot close some schools while it continues to operate others on a segregated basis.[15]

The plaintiffs do not contend that Prince Edward County or Virginia had a hand in the formation of the Prince Edward School Foundation. There is no suggestion that any agency, or official, of Virginia, or of Prince Edward County, has any authority to supervise the operation of the schools of the Prince Edward School Foundation, except insofar as Virginia exercises a general police supervision over all private schools and except that Virginia accredited the schools of the Foundation when they met the requirements applicable to all private schools. Indeed, during the first year of operation, the schools of the Foundation appear to have been as independent of governmental authority as any sectarian or nonsectarian private school in Virginia.

Beginning with the school year 1960-1961, pupils attending schools of the Foundation did receive tuition grants. One of Virginia's statutes[16] providing for the [fol. 254] tuition grants authorized participation by the counties if a particular county does not participate in the tuition grant program, the state will pay the maximum allowable grant but will deduct a portion of its payment from other state funds distributed for purposes unrelated to schools to the nonparticipating county.[17] It was apparently for that reason that in 1960 the Board of Supervisors of Prince Edward County provided for tuition grants which would take the place of a portion of the state grant but would not supplement the funds otherwise available to the pupil. In its effect upon Prince Edward County, its participation in the state-wide program of tuition grants amounted to no more than taking dollars from one of its pockets and putting them into another. As for pupils who were residents of Prince Edward County attending schools of Prince Edward Foundation, or any private school, or a

[15] James v. Almond, E.D. Va. (Three Judge Court), 170 F.Supp. 331.

[16] Code of Virginia § 22-115.31 (1960 Cum. Supp.).

[17] Code of Virginia § 22-115.34 (1960 Cum. Supp.).

public school outside of the county, they got no more by reason of the county's participation in the program.

In 1960, the Board of Supervisors of Prince Edward County also adopted an ordinance providing for credits to taxpayers, not exceeding twenty-five per cent of the total tax otherwise due, for contributions to nonsectarian schools not operated for profit located in Prince Edward County, or to be established and operated in that county during the ensuing year. During the school year 1960-1961, credits aggregating $56,866.22 were allowed by Prince Edward County on account of contributions made to the Foundation.

The allowance of such tax credits appears to be an indirect method of channeling public funds to the Foundation. [fol. 255] They are very unlike Virginia's program of tuition grants to pupils which has a lengthy history.[18] The allowance of such tax credits makes uncertain the completeness of the County's withdrawal from the school business. It might lead to a contention that exclusion of Negroes by schools of the Foundation is county action. Their allowance, however, during the second[19] of the four years that the Foundation has operated its schools does not require a present finding on this record that the County is still in the school business, and that the acts of the Foundation are its acts.

Bearing in mind the fact that the Foundation established and operated its schools without utilization of public facilities and, during the first year, without any direct or indirect assistance of public funds, and the clear showing of

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[18] Virginia's tuition grant program had its first beginning many years ago in aid of children who had lost their fathers in World War I. It was expanded to include others until 1955 when the Supreme Court of Appeals of Virginia held that the tuition grants were in violation of Virginia's Constitution when given to pupils attending private schools. Almond v. Day, 197 Va. 419, 89 S.E. 2d 851. Section 141 of Virginia's Constitution was promptly amended to overturn the result of *Almond* v. *Day*. The statutes authorizing Virginia's present, broad program of tuition grants were enacted in 1960.

[19] In the first year of the Foundation's operation, the County had no provision for any tax credits for contributions. After the second year, no such credits were allowed because of the Court's order.

the independence of the Foundation from the direction and control of the defendants, the allowance of the tax credits is at least equivocal. Inferences of power to influence, if not to control, may follow such encouragement of contributions, though the allowance of income tax deductions by the State and United States for contributions to religious and charitable organizations is not thought to make state or nation a participant in the affairs and operations of the beneficiaries of the contributions. Indeed, their allowance [fol. 256] has come in recognition of public interest in encouragement of private contributions to religious, educational and charitable institutions and organizations. Here, however, the allowance of the tax credit comes in a more particularized context, and that context is not complete without consideration of Virginia's tuition grants.

As indicated above, Virginia's tuition grants had a considerable history. That program has not been attacked in this case. Its constitutionality has not been questioned. Elsewhere, apparently, it has not been utilized to circumvent the segregation of public schools. In the school year just closed, thirty-one school districts in Virginia were desegregated to some degree.[20] The basic program of tuition grants, however, its antecedents and its operation and effect were not examined by the court below.[21]

Moreover, the effect of tax credits and tuition grants ought to be determined only in the light of the correlative duties and responsibilities of the Commonwealth and the County in connection with the operation of schools in the County. What they are and how they are distributed turn entirely upon the proper construction of a number of constitutional and statutory provisions of the Commonwealth. If, as the District Court found, Virginia's Constitution requires the Commonwealth as such to open and operate schools in Prince Edward County, what Prince Edward County does in the allowance of tax credits for contributions to otherwise independent educational institutions may

[20] Southern School News, June 1963, Vol. 9, No. 12, page 1.

[21] It enjoined payment of tuition grants by the state because it construed the state statutes as not authorizing them, a construction which we find, at least, dubious.

[fol. 257] be of little moment. On the other hand, if Prince Edward County should be held to have a duty under state law to operate free public schools, then its allowance of tax credits might be a basis for a conclusion, in light of the tuition grant program, that it was undertaking to discharge its duty by indirection and, in effect, was operating the schools of the Foundation.

Such a determination can be made only when the underlying questions of state law have been settled.

The two branches of the principal issue are closely interrelated. As appears above, the question of whether or not Prince Edward County, or Virginia, has such a hand in the operation of the schools of the Foundation as to result in a Fourteenth Amendment requirement that they operate free, public schools on a nondiscriminatory basis for all pupils in the county is dependent, in large measure, upon a determination of Virginia's distribution of authority, duty and responsibility in connection with the schools and their control and operation. Applicability of the principle advanced by the United States as *amicus curiae* depends entirely upon the answers to those questions of state law, for no one questions the principle that if Virginia is operating a state-wide, centralized system of schools, she may not close her schools in Prince Edward County in the face of a desegregation order while she continues to operate schools in other counties and cities of the Commonwealth. Application of the constitutional principle turns solely upon a determination, under state law, of Virginia's role in the operation of public schools in Virginia.[22]

[fol. 258] The answers to these questions are unresolved and unclear. On the one hand, the United States points to Section 129 of Virginia's Constitution, which provides, "The General Assembly shall establish and maintain an efficient system of public, free schools throughout the state," and to those constitutional and statutory provisions

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[22] Here, the Eleventh Amendment question arises. The more the United States asserts that Virginia's Constitution places affirmative, but neglected duties upon Virginia's General Assembly and State Board of Education, the closer it skirts the Eleventh Amendment's prohibition against suits in the courts of the United States by citizens against a state.

providing for a State Board of Education and a Superintendent of Public Instruction, and defining their duties and responsibilities. On the other hand, the defendants point to Section 133 of Virginia's Constitution which provides that supervision of schools in each county and city shall be vested in a school board and to other constitutional and statutory provisions which, unquestionably, vest large discretionary power in local school boards and in the governing bodies of the counties and cities in which they function.

By Section 130 of the Constitution, the State Board of Education "has general supervision of the school system." It has the power to divide the state into school divisions, though no school division may be smaller than one county or one city. When a Division Superintendent of Schools is to be appointed, the State Board of Education certifies to the local board a list of qualified persons, and the local board may appoint anyone so certified. It selects and approves textbooks for use in the schools. It is required to manage and invest certain school funds of the state, and the General Assembly is empowered to authorize the State Board to promulgate rules and regulations governing the management of the schools.

Section 135 of Virginia's Constitution requires the application of receipts from certain sources to schools of the primary and grammar grades. These "constitutional funds" are apportioned among the counties and cities according to [fol. 259] school population. In addition, the General Assembly is authorized to appropriate other funds for school purposes, and those funds are apportioned as the General Assembly determines. Section 136 of the Constitution authorizes the counties and towns to levy taxes and appropriate funds for use "in establishing and maintaining such schools as, in their judgment, the public welfare may require."

The General Assembly of Virginia has adopted the consistent practice of appropriating funds, other than the "constitutional funds," for distribution to the counties and cities for school purposes. Such appropriations are conditioned upon local appropriations. Thus, before the schools in Prince Edward County were closed, the local school

board received its proportion of the constitutional funds, and, in addition, it received whatever funds were appropriated by Prince Edward's Board of Supervisors, plus matching funds from the state which became payable because of the local appropriation. Since the schools were closed, the Prince Edward County School Board received no funds from the state during the school year 1959-1960. It has received its proportionate part of the constitutional funds, but those only, in subsequent years, and these are the funds it has used to keep its physical properties in repair and insured, but they have been insufficient to enable it to do anything else.

This arrangement, the defendants say, is a local option system under which each county is authorized to determine for itself whether or not it will operate any schools and, if so, what schools and what grades. They emphasize the provisions of Section 136 of the Constitution which gives the local authorities the right to appropriate funds "in establishing and maintaining such schools as, in their judg- [fol. 260] ment, the public welfare may require," which is limited by a provision that, until primary schools are operating for at least four months per year, schools of higher grades may not be established. This, they say, clearly authorizes and requires what is done in practice. The local school board, it is said, determines what schools and facilities are required. It budgets the estimated costs of their maintenance and operation, and submits its estimates to the local Board of Supervisors. The Board of Supervisors may not overturn particular determinations of the school board, but it, say the defendants, has an unfettered discretion in levying taxes and appropriating funds. It may appropriate funds equal to the school board's budgetary estimate, but it also may appropriate less or nothing at all. If the Board of Supervisors appropriates nothing for use by the school board, then the matching state funds are unavailable and the schools cannot be operated.

Among Virginia's statutes may be found clear provisions for local option. Under Sections 16.1-201-2 of the Virginia Code, a county may elect to establish juvenile detention facilities. If it does so, the state will contribute funds to meet, in part, the cost of construction and operation. Under

Section 32-292, et seq., a county may elect to participate in a program of state-local hospitalization. If a county elects to do so, the state, with certain limitations, will contribute one-half the cost of such hospitalization. The defendants suggest that there is no unconstitutional geographic discrimination in such local option programs, though one or more counties may not elect to participate in them.

Federal analogies readily come to mind. The United States makes available to participating states which enact [fol. 261] prescribed legislation, grants for unemployment compensation administration.[23] Under the National Defense Education Act,[24] federal funds are made available to localities conducting in their schools approved programs of science, mathematics and foreign languages. It is suggested that there is no geographic discrimination in the provision for such optional grants, though a state or locality may exercise its opinion not to participate.

Such local option provisions as those the defendants think analogous are constitutionally unassailable.[25] When a state undertakes to encourage local conduct of educational or social programs by making matching funds available to participating localities, there is no discrimination against nonparticipating localities. Since every locality may participate if it wishes to do so, and the state funds are available to each upon the same conditions, the state is even-handed.

The question here, however, is whether Virginia's school laws establish an arrangement within the local option principle the defendants advance. If Section 129 of Virginia's Constitution imposes upon the General Assembly the duty to provide operating, free, public schools in every county, as the United States contends, its election to establish a system having features of a local option arrangement may be permissible under state law only so long as

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[23] 42 USCA § 501, et seq.

[24] 20 USCA § 401, et seq.

[25] Salsburg v. Maryland, 346 U.S. 545; Ohio *ex rel.* Lloyd v. Dollison, 194 U.S. 445; Rippey v. Texas, 193 U.S. 504; Ft. Smith Light & Traction Co. v. Board of Improvement, 274 U.S. 387.

[fol. 262] schools are operated in every county. On the other hand, if Section 129 of Virginia's Constitution, construed in the light of other constitutional provisions, requires of the General Assembly only that it provide for a system of education under which counties and cities are authorized to establish and maintain schools of their own with state assistance, then the principle which the defendants assert may be applicable. The answer is unclear. It requires interpretation and harmonization of Virginia's Constitution and statutes.

The question is unresolved. Virginia's Supreme Court of Appeals has considered her school laws in a number of cases, but none of them settle the question here.

In School Board of Carroll County v. Shockley, 160 Va. 405, 168 S.E. 419, the Court held unconstitutional an act of the General Assembly requiring the imposition of local taxes and the use of the proceeds in the construction of a particular school.[26] In Board of Supervisors of Chesterfield County v. School Board of Chesterfield County, 182 Va. 266, 28 S.E. 2d 698, the Court said that the local school board is "to run the schools," and it alone has the power to determine how locally appropriated funds are to be spent. In Griffin v. Board of Supervisors of Prince Edward County, 203 Va. 321, 124 S.E. 2d 227, the Court held that in levying taxes and appropriating funds for school purposes, the Board of Supervisors exercised a legislative and discretionary function, and that it was not subject to mandamus. In Scott County School Board v. Board of Supervisors, 169 Va. 213, 193 S.E. 52, it had been held that mandamus was not available to a school board to compel the supervisors of its county to appropriate funds sufficient [fol. 263] to cover the school board's estimates of the cost of school operation.

In none of those cases, however, has Virginia's Supreme Court of Appeals considered the requirements of Section 129 of the Constitution when schools cease to operate because the local Board of Supervisors levies no taxes and appropriates no funds for the purpose. That Court may conclude that, in light of the closure of the schools in Prince

[26] See also Almond v. Gilmer, 188 Va. 1, 49 S.E. 2d 431.

Edward County, Section 129 of the Constitution requires something more of the General Assembly or of the State Board of Education.

That conclusion, however, is not forecast by Harrison v. Day, 200 Va. 439, 106 S.E. 2d 636, in which Virginia's Supreme Court of Appeals struck down Virginia's massive resistance laws. Nor is there anything in the Three-Judge Court decision of James v. Almond, E.D. Va., 170 F. Supp. 331, which approaches federal determination of this state question. There, the Governor seized and removed from the school system six of Norfolk's schools subject to desegregation orders. He acted under color of a state statute which required him to do so. In holding the statute unconstitutional the Court did not decide that all schools in Virginia were administered by the state on a state-wide, centralized basis. The seizure was clearly that of the Governor and the discrimination was inherent in the statute whether the schools were otherwise operated upon a local option basis or directly by the state. When the state acts to seize and close every school subject to a desegregation order, its sufferance of continued operation of other schools within its borders is as discriminatory as its direct operation of them.

[fol. 264] These controlling questions of state law, uncertain and unsettled as they are, ought to be determined by the Supreme Court of Appeals of Virginia, which alone has the power to give an authoritative interpretation of the relevant sections of Virginia's Constitution and of her statutes. As it was so forcefully said in Railroad Commission of Texas v. Pullman Company, 312 U.S. 496, this Court cannot settle the state questions; it can do no more than predict what Virginia's Supreme Court of Appeals will do when the questions come before it. If we should hazard a forecast and it should be proven wrong, any present judgment based upon it will appear both gratuitously premature and empty when the state questions are authoritatively resolved in the state courts. Particularly is this true when, with so little to guide us, we cannot predict with any semblance of confidence how the several state questions will be ultimately resolved in the state courts. In

such circumstances, abstention until the state questions are determined is the proper course.[27]

Abstention, under the circumstances, is all the more appropriate because the case of County School Board of Prince Edward County, Virginia, et al., v. Griffin, et al., is already pending on the docket of the Supreme Court of Appeals of Virginia and will be heard by that Court in October. From a reading of the opinion of the Circuit Court of the City of Richmond in that case, it appears that the essential questions of state law upon which decision here turns are presented in that case and will be determined by that Court as it considers and adjudicates [fol. 265] the same primary question tendered in this case, the existence of judicially enforceable rights in the plaintiffs to have the schools reopened. That state court proceeding had not been commenced when the District Judge acted on the primary question in this case. In abandoni his earlier decision to abstain, he referred to the fact that no such proceeding was pending or then contemplated. Had it been then pending, he probably would have awaited its outcome. The fact that a case, apparently ripe for decision, is now pending on the docket of Virginia's Supreme Court of Appeals, makes easier our conclusion that the controlling questions of state law, which govern the application of unquestioned constitutional principles, ought to be determined by the state courts, and that, when they may be so determined, the federal courts ought to abstain from constitutional adjudication premised upon their notions of state law which may or may not turn out to be accurate forecasts.

Accordingly, the judgments below will be vacated and the case remanded to the District Court, with instructions to abstain from conducting further proceedings until the Supreme Court of Appeals of Virginia shall have decided the case now pending on its docket entitled County School Board of Prince Edward County, Virginia, et al., v. Leslie Francis Griffin, Sr., et al., and that decision has become

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[27] Railroad Commission of Texas v. Pullman Company, 312 U.S. 496; Harrison v. N.A.A.C.P., 360 U.S. 167; Spector Motor Service, Inc. v. McLaughlin, 323 U.S. 101.

final, with leave to the District Court thereafter to entertain such further proceedings and to enter such orders as may then appear appropriate in light of the determinations of state law by the Supreme Court of Appeals of Virginia.

Vacated and remanded.

[fol. 266] J. SPENCER BELL, Circuit Judge, dissenting:

Because of the inordinate delays which have already occurred in this protracted litigation, I hasten, without exhausting the subject, to indicate the reasons for this dissent.

I think the order of the District Court should be implemented at once for either of two reasons, each of which is amply supported by the findings of fact and the conclusions of law set forth in the District Court's opinion. First, because the public school system of Virginia is maintained, supported and administered on a statewide basis by the Commonwealth of Virginia; therefore, the closure of the schools of this one county constitutes discrimination. Second, the defendants closed the schools solely in order to frustrate the orders of the federal courts that the schools be desegregated.

The plaintiffs assert a federal right guaranteed by the Constitution; the jurisdiction to determine this right is vested in the federal courts. A refusal to adjudicate this right would be violation of the courts' duty. *Monroe* v. *Pate*, 365 U.S. 167 (1961). The plaintiffs must not be required to exhaust their remedies in the state's courts before having their federal rights determined in the federal courts. *McNeese* v. *Board of Education*, 31 U.S. L.W. 4567 (decided June 3, 1963). The defendants have been given ample opportunity heretofore to have the state courts speak. In its opinion of July 25, 1962, the district court said:

> ". . . upon the further assurance of counsel for the Board of Supervisors of Prince Edward County (which assurance was given after conferring with the Attorney [fol. 267] General of Virginia and counsel for the School Board of Prince Edward County) that he would file such a suit if the petitioners failed to do so, this

court abstained from determining the issue, pending a final ruling by the Supreme Court of Appeals of Virginia."

In spite of this assurance the defendants not only failed to bring a suit for this purpose, but they deliberately failed to raise the issue in a suit brought by the plaintiffs to assert their rights under the Virginia Constitution. Finally, at long last, when the district court proceeded to declare the plaintiffs' rights under federal law, the defendants commenced the suit to raise the issue in the state courts, demanding that the federal courts further abstain. This is not abstention—this would be a humble acquiescence in outrageously dilatory tactics, and the district court was right to reject it. We have neither the duty nor the right to pressure the state courts to declare federal rights, and they are not bound by conscience or law to engage in a race with the federal courts to declare federal rights.[1] Courts are not self-activating, if the defendants here chose to refrain from seeking a state court determination until the district court was finally forced to act, they should not now be heard to call for further abstention—when as the district court said on October 10, 1962: "Abstention would create an irreparable loss in the formal education of the children of Prince Edward County". Abstention is not sanctioned by any law—it is a court evolved doctrine of courtesy—it must not be used to frustrate the plain rights of litigants. [fol. 268] To do so now under the present posture of this case is not abstention, it is abnegation of our plain duty.

A brief review of the record leaves no doubt whatsoever that the public schools of Virginia were established and are being maintained, supported and administered in accordance with state law, primarily on a statewide basis. I see no need to review in detail the evidence supporting that conclusion. The Constitution of the state compels the Legislature to appropriate funds for this purpose—funds derived from the taxation of Negroes as well as whites in Prince Edward and other counties. The Virginia Code

[1] The Supreme Court of Appeals of Virginia refused last June to put the case ahead on its calendar.

provides that the public free school system shall be administered by a State Board of Education which is responsible for dividing the state into appropriate school divisions. The State Board prescribes the rules and regulations for conducting the high schools as well as the requirements for admission. A Superintendent of Public Instruction is appointed by the Governor. Local school boards are regulated to a great extent by state law. All power of enrollment or placement of pupils in the public schools is vested in a State Pupil Placement Board, whose members likewise are appointed by the Governor. I do not believe that it can be seriously argued that public education is not a state function in Virginia. This being true, since the state maintains and operates schools elsewhere in the state, its failure to do so in Prince Edward County, by permitting the County Board of Supervisors to close the schools for a discriminatory reason, violates the Fourteenth Amendment.

The district court's finding that Virginia is operating and maintaining a statewide system of schools not being clearly erroneous is binding on us. Indeed it is a fact so firmly established that we would be required to take ju- [fol. 269] dicial notice of it. That decision is buttressed by the decision of the three judge district court in *James* v. *Almond*, 170 F. Supp. 321, 337 (E.D. Va. 1959), wherein the court said:

> "Tested by these principles we arrive at the inescapable conclusion that the Commonwealth of Virginia, having accepted and assumed the responsibility of maintaining and operating public schools . . . [cannot close one or more because of segregation] . . . While the State of Virginia directly or *indirectly* maintains and operates a school system with the use of public funds, *or participates by arrangement or otherwise* in the management of such a school system [it may not close schools to avoid segregation]." (Emphasis added).

It is worthy of note that the Supreme Court of Appeals of Virginia points to the mandatory provisions of Section 129 of that state's Constitution, which provides: "The

General Assembly shall establish and maintain an efficient system of public free schools throughout the State". *Griffin* v. *Board of Supervisors of Prince Edward Co.*, 203 Va. 321, 124 S.E.2d 227.

Faced with the inescapable fact that the State of Virginia is maintaining and operating a statewide system of schools, the deeply abstruse and highly technical arguments about whether Virginia's laws permit a local unit to close its schools are academic under the Fourteenth Amendment. For this purpose the county is acting as an agency of the state, and the state may not directly or indirectly evade the command of the Amendment. What the state could not do directly in *James* v. *Almond* it may not do indirectly in this [fol. 270] case. In *Hall* v. *St. Helena Parish School Board*, 197 F. Supp. 649, Aff'd. 365 U.S. 569 (three judge court), the State of Louisiana attempted to set up a local option system to avoid a court order to desegregate. The court struck down the law and forbade the practice. In doing so it said:

> "The equal protection clause speaks to the state. The United States Constitution recognizes no governing unit except the federal government and the state. A contrary position would allow a state to evade its constitutional responsibility of carve-outs of small units. At least in the area of declared constitutional rights, and specifically with respect to education, the state can no more delegate to its subdivisions a power to discriminate than it can itself directly establish inequalities. When a parish wants to lock its school doors, the state must turn the key. If the rule were otherwise, the great guarantee of the equal protection cause would be meaningless."

And this court in an opinion concurred in as to this point by every member of the court, including the members of the present panel, in the case of *Bell* v. *School Board of Powhatan Co.* (No. 8944, decided June 29, 1963), ... F.2d ....., said of the School Board of that Virginia County:

> "They are not told to exercise powers they do not have; they are merely forbidden to take any steps themselves toward the closing of the schools, and *this injunction is necessary to prevent a violation of the equal protection of the Fourteenth Amendment.*" (Emphasis added).

[fol. 271] Whether the local unit is ordered to close its schools or permitted to do so under state law is immaterial, so long as the state directly or indirectly participates in the operation of a statewide system of schools.

Nor do I think this suit is barred by the Eleventh Amendment to the Constitution of the United States. It is well settled that a suit against a political subdivision of a state, such as a county, is not barred by the Eleventh Amendment. The leading decision in *Lincoln County* v. *Luning*, 133 U.S. 529 (1890), where the point was urged that the county is an integral part of the state and could not, therefore, be sued under the Eleventh Amendment. The Supreme Court said:

> "... It may be observed that the records of this court for the last thirty years are full of suits against counties, and it would seem as though by general consent the jurisdiction of the federal courts in such suits has become established."

In *Kennecott Copper Corporation* v. *State Tax Comm.*, 327 U.S. 573 (1946), the Supreme Court again held that consent was not necessary for suits against counties and municipalities. In short, insofar as the Eleventh Amendment is concerned a suit in equity to compel affirmative action by a county through its Board of Supervisors is maintainable for the simple reason that a county as such is not a "state" within the meaning of the constitutional prohibition. I am aware of those cases cited which invoke the constitutional bar if the subsidiary political unit bears such a relationship to the state in the particular function involved as to constitute it an agent of the state with respect to that function. They do not apply in this case. This court [fol. 272] has recently discussed this distinction in *Duck-*

worth v. *James*, 267 F.2d 224 (4 Cir. 1959), *cert. denied* 361 U.S. 835. There it was held that an injunction would lie to restrain the City of Norfolk from withholding funds from the Norfolk School Board. It is the state scheme itself which provides that part of the essential operating revenue must come from the taxes levied by local boards. The words of this court in *Duckworth* v. *James, supra,* are pertinent:

> "The present case falls within the class of cases where a public officer or agent makes use of his authority to perform an illegal act by invoking the command of an unconstitutional statute or *seeks to carry out a valid statute in an unconstitutional manner.* (Emphasis added). In such cases it is held that his action is not the act of the state but the act of an individual which may be restrained by the injunctive power of the federal court."

Neither am I impressed with the argument that the district court has no power to compel a levy of taxes for a monetary appropriation by the defendant Board of Supervisors should it fail to obey the mandate of the district court. It should be enough to cite *Virginia* v. *West Virginia,* 246 U.S. 565 (1918). There the defense was advanced by West Virginia that the judicial power of the United States did not extend to the coercing of a judgment by a decree requiring a tax to be levied. The opinion of the court is plain in its implication that West Virginia could be compelled to pay if compulsion were the only way to accomplish the result. But it is necessary here only to decide whether the subdivision of the state (Prince Edward County) may be required to provide the funds necessary to comply with the judgment. There can be no doubt [fol. 273] that the judicial power may enforce the levy of a tax to meet a judgment rendered. *Labette County Commissioners* v. *Moulton,* 112 U.S. 217 (1884). See also *Graham* v. *Folsom,* 200 U.S. 248 (1906). It is to be noted that the Supreme Court of Appeals of Virginia in *Griffin* v. *Board of Supervisors of Prince Edward County,* 203 Va. 321, 124 S.E.2d 227 (1962), did not consider whether under federal law the County Board could be compelled to levy

taxes and appropriate funds for the operation of the county public school system. The Virginia law does not prohibit the Supervisors from levying the taxes and appropriating the revenue, it merely vests in them the power to decide whether this shall be done. In *City of Galena* v. *Amy*, 72 U.S. (5 Wall.) 705 (1866), a suit was brought in a federal court to recover interest on bonds. The Supreme Court required that discretionary taxing power be exercised in a particular manner. I think that under federal constitutional law an affirmative order is appropriate here notwithstanding the unavailability of mandamus under Virginia law. The County Board has the unquestionable power to levy the taxes; the schools of this County may not remain closed while the state maintains a school system elsewhere.

Finally, the Board of Supervisors of Prince Edward County closed the public schools for the sole purpose of avoiding compliance with the decree of this court. The district court so found. The Board publicly proclaimed its intention and purpose by its resolution dated May 3, 1956:

> "Be It Resolved, That the Board of Supervisors of Prince Edward County . . . do hereby declare it to be the policy and intention of the said Board . . . that no tax levy shall be made . . . nor public revenue derived [fol. 274] from local taxes . . . be appropriated for the operation and maintenance of public schools in said county wherein white and colored children are taught together under any arrangement or plan whatsoever."

This was the defiant response to the decision of the Supreme Court in *Brown* v. *Board of Education*, 347 U.S. 483 (1954), applying expressly to the schools of Prince Edward County. The district court found that it was passed in anticipation of our decision in 1959 that desegregation in compliance with *Brown* should commence in the fall of 1959. In the factual context of this case I cannot agree with the majority that this was a permissible compliance with the Supreme Court's order. The law has long been settled that such conduct violates the Fourteenth Amendment and may be enjoined. *Brown* v. *Board of Education*, 347 U.S. 483; *Cooper* v. *Aaron*, 358 U.S. 1; *Aaron* v.

Cooper, 261 F.2d 97 (8 Cir. 1958); *James* v. *Duckworth*, 170 F.Supp. 342 (E.D. Va. 1959); *James* v. *Almond*, 170 F.Supp. 331 (E.D. Va. 1959); *Aaron* v. *McKinley*, 173 F.Supp. 944 (E.D. Ark. 1959), *Aff'd sub nom. Faubus* v. *Aaron*, 361 U.S. 197; *Bush* v. *Orleans Parish School Board*, 190 F.Supp. 861 (E.D. La. 1960). Equal educational opportunity through access to nonsegregated public schools is secured by the Constitution. The state has an affirmative duty to accord to all persons within its jurisdiction the benefits of that constitutional guarantee. *Taylor* v. *Board of Education*, 294 F.2d 36 36 (2 Cir. 1961). Indeed Congress regarded so highly the duty of maintaining public schools that when it readmitted at least three Confederate states, Virginia, Mississippi and Texas, it specifically required that their constitutions:

> [fol. 275] "... shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of school rights and privileges secured by the constitution of said State." 16 Stat. 62, 67 and 80 (1870).

It is tragic that since 1959 the children of Prince Edward County have gone without formal education. Here is a truly shocking example of the law's delays. In the scales of justice the doctrine of abstention should not weigh heavily against the rights of these children.

[fol. 276] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 8837.

COCHEYSE J. GRIFFIN, MIGNON D. GRIFFIN, NAJA D. GRIFFIN and L. FRANCIS GRIFFIN, JR., infants, by and through L. FRANCIS GRIFFIN, SR., their father and next friend, OSA SUE ALLEN and ADA D. ALLEN, infants, by and through HAL EDWARD ALLEN, their father and next friend, TOBY HICKS, CARL HICKS, GREGORY HICKS, et al., Appellants and Cross-Appellees,

VS.

BOARD OF SUPERVISORS OF PRINCE EDWARD COUNTY and J. W. WILSON, JR., Treasurer of Prince Edward County; STATE BOARD OF EDUCATION OF THE COMMONWEALTH OF VIRGINIA and WOODROW W. WILKERSON, Superintendent of Public Instruction of the Commonwealth of Virginia, et al., Appellees and Cross-Appellants.

Cross-appeals from the United States District Court for the Eastern District of Virginia.

DECREE—Filed and Entered August 12, 1963

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the judgments of the said District Court appealed from, in this cause, be, and the same are hereby, vacated; that this cause be, and the same is hereby, remanded to the United States District Court for the Eastern District of Virginia, at Richmond,

for proceedings consistent with the opinion of the Court filed herein; and that each side bear its own costs on appeal.

Clement F. Haynsworth, Jr., United States Circuit Judge:
Herbert L. Boreman, United States Circuit Judge.

I dissent:

J. Spencer Bell, United States Circuit Judge.

[fol. 277] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

[Title omitted]

MOTION TO STAY COURT'S DECREE PENDING FILING AND DISPOSITION OF PETITION FOR WRIT OF CERTIORARI—Filed August 21, 1963

Motion is herein made to stay the decree entered by this Court on August 12, 1963, vacating the judgment and remanding the above cause to the District Court, with instructions to abstain from conducting further proceedings until the Supreme Court of Appeals of Virginia has decided the case now pending on its docket entitled County School Board of Prince Edward County, Virginia, et al., v. Leslie Francis Griffin, Sr., et al., and that decision has become final.

Appellants believe the aforesaid decree is based upon in-
[fol. 278] valid legal premises and are preparing to file a petition for writ of certiorari in the Supreme Court of the United States as expeditiously as they can, after they have been furnished with a certified copy of the record herein by the Clerk of the Court.

It is respectfully submitted that the Court's opinion raises an important federal question which should be disposed of by the Supreme Court of the United States. Appellants move, therefore, that the decree be stayed pending

the filing and disposition of the petition for writ of certiorari by the United States Supreme Court.

Robert L. Carter, 20 West 40th Street, New York 18, New York;

S. W. Tucker, Henry L. Marsh, III, 214 East Clay Street, Richmond 19, Virginia, Attorneys for Appellants and Cross-Appellees, by Robert L. Carter.

Dated: August 20, 1963.

Certificate of service (omitted in printing).

[fol. 279] August 23, 1963, opposition of appellees and cross-appellants to motion to stay court's decree pending filing and disposition of petition for writ of certiorari filed.

September 4, 1963, statement of appellants and cross-appellees as to reasons for requested stay filed.

[fol. 280] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

[Title omitted]

ORDER DENYING MOTION TO STAY JUDGMENT, ETC.
—September 16, 1963

Upon consideration of the plaintiffs' motion for a stay of the judgment of this Court, and it appearing that a stay is unnecessary to further proceedings in the Supreme Court of the United States, and that the plaintiffs will suffer no irreparable harm if the stay is not granted;

It Is Now Ordered that the plaintiffs' motion to stay the judgment in this Court, pending the filing and disposition of a petition for a writ of certiorari in the Supreme Court of the United States, be, and the motion hereby is, denied.

Clement F. Haynsworth, Jr., United States Circuit Judge;

Herbert L. Boreman, United States Circuit Judge.

[fol. 281] DISSENT TO ORDER

I dissent because the effect of this order will be to further entrench and perpetuate the irreparable harm inherent in the operation of an illegal tuition grant system while the public schools of Prince Edward County remain closed.

J. Spencer Bell, United States Circuit Judge.

[fol. 282] Clerk's Certificate to *foregoing* transcript (omitted in printing).

[fol. 283]

SUPREME COURT OF THE UNITED STATES

No. 592, October Term, 1963

COCHEYSE J. GRIFFIN, etc., et al., Petitioners,

vs.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, et al.

ORDER ALLOWING CERTIORARI—January 6, 1964

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted, and the case is set for argument on March 30, 1964.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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Office-Supreme Court, U.S.
FILED
OCT 30 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1963

No. 592

COCHEYSE J. GRIFFIN, ETC., et al.,
Petitioners,

v.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, et al.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1963

No.

COCHEYSE J. GRIFFIN, ETC., et al.,

Petitioners,

v.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, et al.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners pray for a writ of certiorari to review the judgment and decree of the United States Court of Appeals for the Fourth Circuit entered in this cause on August 12, 1963.

Opinions Below

The opinion of the court below is not yet reported and is appended hereto, *infra* as Appendix A. The August 23, 1961, and July 25, 1962, opinions of the district court are reported *sub nom. Allen* v. *County School Board of Prince Edward County*, at 198 F. Supp. 497 and 207 F. Supp. 349, respectively.

Jurisdiction

Jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1254 (1). The decree of the court of appeals was entered on August 12, 1963, vacating the judgments of the district court on the authority of the doctrine of federal abstention. Application was made to this Court for a stay pending the filing and disposition of this petition for writ of certiorari. That application was granted on September 30, 1963, in an order signed by Mr. Justice Brennan.

Questions Presented

I

Whether the circumstances of this case are such that application of the doctrine of federal abstention is appropriate or required?

II

Whether a clear violation of the Fourteenth Amendment has been demonstrated, necessitating effective redress by the federal courts, in view of the uncontroverted evidentiary showing that the public schools of Prince Edward County were closed to avoid the obligation to maintain and operate an unsegregated public educational system, pursuant to an anticipated order of the federal court requiring desegregation, and to defeat and frustrate the federally protected rights of Negro children to educational opportunities free from the onus of racial discrimination?

III

Whether an injunction against the payment of state tuition grants should be broad enough to bar utilization of all such aid, grants or procedures which are, or may be, used to circumvent and nullify the realistic and effective desegregation of the public school system, and to frustrate and de-

feat the rights of Negro children to obtain equal educational opportunities, consistent with the due process and equal protection clauses of the Fourteenth Amendment?

IV

Whether the Fourteenth Amendment's guarantee of equal protection of the laws has been breached by publicly supported education being sponsored throughout the State of Virginia, except in Prince Edward County where it has been abandoned to prevent desegregation, as required by decisions of the federal courts?

Statement

Prior Court proceedings:

This litigation began in 1951. It reached this Court sub nom. *Davis* v. *County School Board of Prince Edward County* as one of the original school segregation cases. The law of the case, therefore, is to be found in *Brown* v. *Board of Education*, 347 U. S. 483, and in 349 U. S. 294, which established a formula for its implementation "with all deliberate speed" by federal district courts. Two years after the implementation decision, the district court held that additional time was necessary before desegregation, as decreed by this Court, should be put into effect. 149 F. Supp. 431 (E. D. Va. 1957). The court of appeals reversed that decision and ordered prompt and reasonable compliance with this Court's decree. 249 F. 2d 462 (4th Cir. 1957).[1] On August 4, 1958, in its decision on remand, the district court construed the "with all deliberate speed" yardstick as authorizing delay of desegregation of the

[1] This decision is reported sub nom. Allen v. County School Board of Prince Edward County. At this point Dorothy Davis and a number of the original plaintiffs had graduated and hence had lost all opportunity for enjoyment of the constitutional rights which had been declared theirs.

public schools in Prince Edward County until 1965. 164 F. Supp. 786. On May 5, 1959, the court of appeals again reversed the district court and, in this instance, ordered that desegregation of the public schools should commence in September, 1959. 266 F. 2d 507. It was not until April, 1960, that the district court entered an order on the May 5, 1959, mandate of the court of appeals.

The Closing of the Public Schools:

In the meantime, preparation had begun in Prince Edward County to close down the public schools in the event of court compulsion to operate a nonsegregated school system. On June 9, 1955, the Prince Edward School Foundation was chartered to furnish educational facilities for white children if and when the public schools were closed (T. 159).[2] On May 3, 1956, the Board of Supervisors adopted a resolution declaring it to be its policy and intention "in accordance with the will of the people of the said county that no tax levy shall be made upon the said people nor public revenue derived from local taxes shall be appropriated for the operation and maintenance of public schools in said county wherein white and colored pupils are taught together under any plan or arrangement whatsoever."[3]

On June 3, 1959, the Board of Supervisors met and took action refusing to approve a budget for the operation of the public schools in the county for the 1959-1960 school year. In so doing, it stated for the record "that the Board of Supervisors of Prince Edward County does not intend to make any levy of taxes or to appropriate any money for the operation of public schools or for additional purposes in the year 1959-1960."

---

[2] "T" refers to the transcript of the 1961 trial in the district court.

[3] The full text of this Resolution is appended hereto as Appendix B. It was introduced into evidence at the July 24-27, 1961, hearing in the trial court (R. 41).

In its statement the Board explained that it simply was not possible to operate a nonsegregated school system. It said, in part:

> * * * It is with the most profound regret that we have been compelled to take this action * * *
>
> * * *
>
> The School Board * * * is confronted with a court decree which requires the admission of white and colored children to all the schools of the county without regard to race or color. Knowing the people * * * we know that it is not possible to operate the schools * * * within the terms of that principle and * * * maintain an atmosphere conducive to the educational benefit of our people.
>
> We are also deeply concerned that we should not bring about conditions which would most certainly result in further racial tension and which might result in violence of a nature which would be deeply deplored by all of our people and would destroy all hope of restoring the peaceful and happy relations of the races in this county.

This statement was made a part of the record of the Board's proceedings (T. 38, 39, 49, 50).[4] Since that date, no public schools have been in operation in Prince Edward County.

Educational Provisions for White Children in Lieu of Public Schools:

In September, 1959, the Prince Edward School Foundation began operation as a private nonsectarian institute for the education of white children in the county, with two secondary schools (which were consolidated as one senior high school in the second year of operation (T. 175)), and six elementary schools. Approximately 1,376 children were enrolled, all of whom were white (R. 175, 402).[5] The

---

[4] The full text of the aforesaid statement is printed *infra* as Appendix C.

[5] Approximately 1,500 white children were eligible to attend public schools (T. 256) when the public schools closed in 1959 (198 F. Supp. at 499). 46 of those enrolled in the Foundation schools were children from outside the county (T. 175).

secondary school was accredited by the State Board of Education in 1961 (T. 183, 450).[6] During its first year of operation, no tuition was charged (T. 77, 178). Thereafter, however, a tuition fee was established—$240 per year for the elementary grades, $265 per year for secondary schooling (T. 70, 179).[7]

Educational Provisions for Negro Children in Lieu of Public Schools:

As a result of the closing of the public schools, approximately 1,800 Negro children were without schooling (T. 256, 305). The Negro citizens organized the Prince Edward County Christian Association (T. 347), and it operated training centers for Negro children commencing in February, 1960 (R. 340). There was no attempt to provide children in these centers with education in the strictest sense. During the first year, there were ten centers, and in the second year, fifteen (T. 340-341). Supervisors in charge of each center, in all but four instances housewives rather than school teachers, were given complete freedom to conduct the centers in any way they thought proper (T. 340-341). The centers were open from 10 A.M. to

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[6] Elementary schools do not receive state accreditation (T. 104, 454). The schools operated 180 days a year (T. 191-192), and were open from 8:30 A.M. until 1:30 P.M. (T. 193).

[7] The Foundation opened with a staff of 66 teachers. The first year all but two were teachers who had taught during the 1958-1959 school year in the Prince Edward County public schools, and at the time of the trial, in the summer of 1961, only seven or eight of the total number of teachers had not formerly taught in the county public schools (T. 176, 178). The Supplemental Retirement Act (§ 51-111.9 et seq., Code of Virginia, 1950, as amended), formerly limited to public school teachers, was amended in § 51-111.38:01 to embrace teachers in private, nonsectarian schools incorporated after December 29, 1956 (T. 504). Permission was obtained from the State Retirement System for teachers employed by the Foundation to participate in the state teacher retirement plan, pursuant to the provisions of § 51-111.31 (T. 183, 502-504).

1:30 P.M. (T. 341, 409, 419, 435). Their main purpose was to build morale and to foster the habit of group activity among the Negro children, "hoping someday that the public schools would reopen" (T. 341). There was no set curriculum nor uniformity. The children were taught a little arithmetic, reading and writing in some centers (T. 410, 419, 435), while in others no attempt was made to teach any of these basic skills (T. 430). There were no textbooks (T. 429, 441) and no class divisions or age groupings (T. 342). Of the 650 children originally enrolled, 441 remained throughout the year (T. 343). These 441 students, together with the 200 Negro children estimated to have obtained education outside of the county, left over 1,000 Negro children eligible for, but not receiving any kind of schooling (T. 343).

State and Local Tuition Grant Program:

The present tuition grant program had its genesis in the "massive resistance" legislation of the Extra Session of the General Assembly in 1956, chapters 56, 57, 58 and 62. This legislation provided for the channeling of public school funds into private schools, and for tuition grants for children in private schools where such children had been assigned to integrated public schools. In January, 1959, this legislation was significantly amended and, in April of that year, repealed, and a substitute enacted, which was substantially similar to the present 1960 tuition grant statute.[8]

---

[8] The statement of the court below that "Virginia's program of tuition grants to pupils * * * has a lengthy history" is extremely misleading. Prior to 1955 this program was limited to children whose parents had been killed or disabled in World Wars I and II and thereafter. Almond v. Day, 197 Va. 419, 89 S. E. 2d 851 (1955), held tuition grants to children attending private nonsectarian schools contrary to Section 141 of the State Constitution which was promptly amended to permit grants to students attending private schools. The channeling of public school funds to private schools, while withholding them from integrated public schools, was held a violation of Section 129 of the Constitution of Virginia in Harrison v. Day, 200 Va. 429, 106 S. E. 2d 636 (1959).

Section 22-115.29, Code of Virginia, 1950, as amended, states that the General Assembly "mindful of the need for a literate and informed citizenry" declares it to be the policy of the state to encourage the education of all children. In furtherance of this objective, it is held to be in the public interest to provide scholarships from public funds for the education of children "in nonsectarian, private schools in or outside and in public schools located outside, the locality where the child resides." Authorization is given for levying of local taxes to provide such scholarships.

Section 22-115.30 provides that state grants shall be $125 per child in elementary school and $150 per child in secondary school. Sections 22-115.31, 22-115.32 and 22-115.36 provide for appropriations for local scholarships and require that local allowances, along with state grants, shall be sufficient to cover the cost of tuition, or a minimum of $250 in elementary school and $275 in secondary school.

During the 1960-1961 school term, state tuition grants of $150 were awarded parents for each child in the secondary school and $125 for each child attending the elementary schools of the Prince Edward School Foundation (T. 135).

On July 18, 1960, pursuant to above cited statutes, two ordinances were enacted by the Board of Supervisors. One provided for tuition grants of not less than $100 for each child for the parents of children enrolled in a private nonsectarian school in the county offering a course of systematic educational training of not less than 180 days duration. The second authorized a 25% real and personal property tax credit for contributions made to any nonprofit, nonsectarian private school operating in the county (T. 48).

Thus, parents of each child attending the Prince Edward School Foundation elementary schools in the 1960-61 school

term was eligible to receive $225 in public funds, and every child who attended the secondary school was eligible to receive $250 from the public treasury (T. 135, 237).[9] Some $332,441.11 (T. 200) was paid to the Foundation for tuition. In addition, tax credits in the amount of $52,866.22 was allowed on 1961 local taxes for contributions made to the Prince Edward School Foundation (T. 147, 152).[10] All of the foregoing facts are uncontroverted.

The Instant Court Proceedings:

A supplemental complaint was filed in June, 1960, and amended in September, 1960. The latter complaint joins the Board of Supervisors of Prince Edward County, the State Board of Education, the State Superintendent of Public Instruction and the County Treasurer as party-defendants, and prays that respondents be enjoined from: (1) refusing to maintain and operate a system of public free schools in the county; (2) expending public funds for the direct or indirect support of any private school which excludes persons by reason of race; (3) crediting any taxpayer with monies paid or contributed to any such private school; (4) conveying, leasing or transferring title to public schools in the county to any private corporation, association, partnership or individual; and (5) such other relief as the court might deem appropriate (A21-28).[11]

---

[9] During the 1960-1961 school year 1,327 white students enrolled in the schools of the Foundation obtained state tuition grants (198 F. Supp. at 502). There was a total of $174,104.86 in state funds paid in tuition grants to children in Prince Edward County. Except in five instances, these $125 and $150 grants helped finance the education of children in the Foundation's schools (T. 135, 136). 1358 of these students obtained county tuition grants (T. 237), for a total of $135,800.

[10] The Negroes enrolled in the training centers made no effort to take advantage of the tuition grant plan (T. 344, 353). The State Superintendent of Education testified that these centers, in any event, did not meet state standards enabling those in attendance to participate in the state tuition grant program (T. 454, 458).

[11] A refers to the appendix to the brief of appellants (petitioners here) in the court of appeals.

On August 23, 1961, the district court filed the first of its two memorandum opinions (198 F. Supp. 497). It enjoined the use of public funds for the direct or indirect support of private schools for white children and the payment of tuition grants for children living *in Prince* Edward County to attend such schools as long as public schools in the county remained closed. The court expressly found the respondent Board of Supervisors' refusal to levy taxes or to appropriate money for the maintenance of public schools for the September, 1959-60, school term to have been in anticipation of the decision of the court of appeals ordering school desegregation to commence in September, 1959, and in accord with the Board's declared policy of May 3, 1956 to "abandon public schools and educate children in some other way, if that be necessary to preserve separation of the races * * *" (198 F. Supp. at 499). But the issue, as to whether the public schools could be closed to avoid implementation of the order of the federal courts requiring desegregation was left undecided. It was the court's view that this question would require interpretation of the Constitution and laws of the Commonwealth of Virginia and that, therefore, the doctrine of federal abstention was applicable. A formal order pursuant to this opinion was entered on November 17, 1961 (A-66).

Acting in accord with this view, proceedings were instituted in the Supreme Court of Appeals of Virginia for a writ of mandamus requiring the Board of Supervisors to levy taxes and appropriate money for the operation of free public schools in the county, on the grounds that such was required by Section 136, as read in the light of Section 129, of the Constitution of Virginia. On May 5, 1962, the Supreme Court of Appeals ruled that while the General Assembly was required by the Constitution of Virginia to maintain and operate an efficient system of free public schools, the Board of Supervisors could not be mandated to vote public funds for the maintenance of public schools

in the county. *Griffin* v. *Board of Supervisors of Prince Edward County*, 203 Va. 321, 124 S. E. 2d 227 (1962).[12]

Petitioners returned to the federal court on March 26, 1962, with a motion for further relief, requesting final disposition of all the issues involved in the cause. After hearing and argument on the motion, the court, on July 25, 1962, filed its second memorandum opinion (207 F. Supp. 349), which dismissed petitioners' motion for further relief, denied respondents' motion to dissolve the injunction, continued in effect its injunction against the allowance of tax credits and tuition grants for so long as the public schools remained closed and held that the public schools in the county could not be closed to avoid the effect of the law of the land, while the state permitted other schools to remain open at the taxpayers' expense. The court found that the Board of Supervisors had caused the schools to be closed to avoid discontinuing the racial discrimination prohibited by this Court (207 F. Supp. at 351). The court further stated that if the public schools were not open by September 7, 1962, it would then consider "all proposed orders tendered by counsel of record" (*id.* at 355). It directed the county school board to submit on or before September 7, its proposed plans for the admission of pupils to the elementary and high schools of the county without regard to race (*Ibid*).

At the September 7, 1962, hearing, it was conclusively established that respondents had not complied with the July 25, 1962, decree; that the schools had not been reopened, and that in effect no plans for the re-opening of the schools had been made by the School Board, Board of Supervisors or any other responsible body. Thereafter, the court ordered, adjudged and decreed that the public schools could not remain closed to avoid the effect of the

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[12] In submitting the case to the state court, petitioners argued that there were no federal questions involved, and the court agreed, saying "we perceive none." 124 S. E. 2d at 229.

law of the land while other public schools in the State of Virginia remained open at the taxpayers' expense. The entry of an order of compliance, however, was deferred pending disposition of the cause by the court of appeals.

Petitioners appealed the refusal of the court to require compliance with its July 25, 1962, decree and the order of November 17, 1961, limiting the injunction against tuition grants and tax credits, for only as long as the public schools remained closed.

On November 6, 1962, petitioners filed their brief and appendix in the court of appeals, together with a motion to accelerate the appeal and for the convening of an extraordinary session of that court to hear and dispose of this cause in time for an order to be entered and enforced, requiring the re-opening of the public schools, no later than February 1, 1963.

The cause was argued below on January 9, 1963, but was not decided until August 12, 1963. This delayed adjudication ended all prospects of a final conclusion to this litigation in time for the public schools to be re-opened by September, 1963. The court, by a divided vote—one judge dissenting—ruled that federal abstention was the appropriate doctrine to be applied to all the issues in this cause and, thereupon, entered a decree vacating the judgments below. From this decree petitioners bring the cause here.

Reasons for the Allowance of Writ

1. Application of the doctrine of federal abstention in this cause is misplaced and in direct conflict with principles established in the decisions of this Court. *Allegheny* v. *Frank Mashuda Co.*, 360 U. S. 185; *Harrison* v. *NAACP*, 360 U. S. 167; *Chicago* v. *The Atkinson, Topeka & Santa Fe Ry. Co.*, 357 U. S. 77; *Gov't. and Civic Employees Organizing Committee* v. *Windsor*, 353 U. S. 364; *Spector Motor Service, Inc.* v. *McLaughlin*, 323 U. S. 101; *Chicago* v. *Fieldcrest Dairies*, 316 U. S. 168; *Railroad Commission* v. *Pull-*

man Co., 312 U. S. 496; *Thomas* v. *Magnolia Petroleum Co.*, 309 U. S. 478.

These cases all support the proposition that where the strands of local law are so intermeshed in the issues pending before the federal court, and an authoritative interpretation of the local law questions may make unnecessary consideration of the federal claims presented, the federal courts should abstain from deciding any of the questions involved until an adequate opportunity has been presented to the state courts to interpret the state law questions raised. They also are authority for the converse doctrine, viz., where neither interpretation nor determination of local law is prerequisite or necessary to judicial evaluation of the federal questions, the doctrine of federal abstention is improperly invoked.

The most recent explicit statement of this thesis is found in *McNeese* v. *Board of Education*, 373 U. S. 668. There, this Court stated at page 674 that where there are no underlying issues of state law controlling the litigation and the federal right is not "entangled in a skein of state law that must be untangled before the federal case can proceed" federal abstention is not appropriate. "For petitioners assert that respondents have been and are depriving them of the protection of the Fourteenth Amendment. It is immaterial whether respondents' conduct is legal or illegal as a matter of state law * * *. Such claims are entitled to be adjudicated in the federal courts".[13]

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[13] The Court also said at page 672 that Title 42, United States Code, Section 1983 was enacted to provide a federal remedy:

> 'where the state remedy though adequate in theory, was not available in practice,' * * * and to provide a remedy in the federal courts supplemental to any remedy any State might have.
>
> We would defeat those purposes if we held that assertion of a federal claim in a federal court must await an attempt to vindicate the same claim in a state court.

Jurisdiction in the instant case was invoked under Title 28, United States Code, Section 1343(3) and under Title 42, United States Code, Section 1983.

Petitioners respectfully submit that the *McNeese ratio decedendi* appropriately disposes of this cause.

In addition, the rationale of *Public Utilities Commission* v. *United Fuel Gas Co.*, 317 U. S. 456, 463, is particularly apposite here. There this Court said:

> Where the disposition of a doubtful question of local law might terminate the entire controversy and thus make it unnecessary to decide a substantial constitutional question, considerations of equity justify a rule of abstention. But where, as here, no state court ruling on local law could settle the federal questions that necessarily remain, and where, as here, the litigation has already been in the federal courts an inordinately long time, considerations of equity require that the litigation be brought to an end as quickly as possible.

While a decision pursuant to Virginia law may profess to determine whether respondents are under a state obligation to maintain and operate public schools in Prince Edward County, this is an issue separate and distinct from the federal claims raised in this case, which are based upon the Constitution of the United States, *viz.*: (1) whether respondents may close the schools to avoid the implementation of an existing or anticipated federal court order to operate the public schools without discrimination on the basis of race; (2) whether respondents may close the schools to defeat and frustrate the right of Negro children to equal educational opportunities consistent with the due process and equal protection requirements of the Fourteenth Amendment; (3) whether the schools in Prince Edward County can remain closed while publicly financed education is available to other persons throughout the state without denying to the petitioners the equal protection of the laws as guaranteed by the Constitution of the United States; and (4) whether tuition grants and similar devices may be used as vehicles to defeat and frustrate the rights of the petitioners to free public education unburdened by

discrimination based upon race. These are all federal issues which must be determined in this cause and which cannot be settled with any finality in the state courts.

The basic irony of the present proceedings is that the district court's 1958 (165 F. Supp. 786) postponement of the commencement of desegregation until September, 1965, then seemed a flagrant mockery of this Court's mandate that desegregation proceed with "all deliberate speed." Now, however, that decision will more likely afford an earlier start towards compliance with the fundamental law than will be possible, if the opinion and decree of the court of appeals, brought here for review, prevails.[14]

(a.) The essential facts are not in dispute. Since June, 1959, the Board of Supervisors has refused to appropriate money or levy taxes for the operation of public schools to avoid the necessity of maintaining and operating them without discrimination based upon race, as they would be required to do pursuant to the mandate of the court of appeals of May 5, 1959 (266 F. 2d 507). Nor is there any dispute that the schools in Prince Edward County will remain closed until some court orders them to be opened. In *Brown* v. *Board of Education*, 347 U. S. 483, this Court held that segregation in the public schools was

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[14] The case the court of appeals ordered the trial court to withhold further proceedings pending its determination was begun on August 31, 1962, by the respondent Board of Supervisors and the School Board instituting a suit for a declaratory judgment in the Circuit Court of the City of Richmond. The suit sought resolution of various questions involved or alleged to be involved in the proceedings in the federal court. The Circuit Court of the City of Richmond entered its decision on March 21, 1963. It held that the closing of public schools in Prince Edward County did not violate the state or federal constitutions; that the system of tuition grants was not a scheme to evade Brown, and that state tuition grants were available notwithstanding the closing of the public schools. The cause is now pending before the Supreme Court of Appeals of Virginia, but its outcome cannot finally settle the federal questions posed in this litigation.

a denial of rights guaranteed under the Fourteenth Amendment. It has long been settled doctrine that constitutional proscriptions could not be violated by devices whether ingenious or ingenuous. *Lane* v. *Wilson*, 307 U. S. 268.

In *Cooper* v. *Aaron*, 358 U. S. 1, 17, the Court met an issue similar to the one presented here. It took pains to make clear that the Fourteenth Amendment reaches the activity of all state officials in whatever form the forbidden act may take, who by virtue of their public position under a state government deny to anyone the equal protection of the laws, in whatever guise it may be taken. See in accord: *Aaron v. Cooper*, 261 F. 2d 97 (8th Cir. 1958); *James* v. *Duckworth*, 170 F. Supp. 342 (E. D. Va. 1959), aff'd, 267 F. 2d 224 (4th Cir. 1959); *James* v. *Almond*, 170 F. Supp. 331 (E. D. Va. 1959), appeal dismissed, 359 U. S. 1006; *Aaron* v. *McKinley*, 173 F. Supp. 944 (E. D. Ark. 1959), aff'd, sub nom. *Faubus* v. *Aaron*, 361 U. S. 197; *Bush* v. *Orleans Parish School Board*, 191 F. Supp. 871 (E. D. La. 1961).

Every act of the state which seeks to subvert directly, or indirectly, the rights of persons to equal educational opportunities through access to nonsegregated public schools, is in violation of the Constitution's mandate. Power unquestionably exists in an appropriate federal tribunal to enjoin and restrain such conduct. Cf. *Cooper* v. *Aaron*, *supra*; *Bush* v. *New Orleans Parish School Board*, *supra*.

Whether there is a state obligation to maintain a statewide system of free public education, or whether each separate school district is free to maintain or refuse to finance a free school system in its locale, is not material or crucial to a determination of the fundamental issue presented in this case—whether schools may be closed to inhibit court orders and defeat constitutional rights. See *Aaron* v. *McKinley*, *supra*; *Cooper* v. *Aaron*, *supra*. Wherever that

ultimate obligation may rest, all the decided case law is to the effect that the responsible state agency cannot close or refuse to operate the public schools for the purpose of frustrating the orders of the federal courts or defeating vindication of the constitutional rights of Negro children. *Cooper* v. *Aaron*, *supra*; *Aaron* v. *McKinley*, *supra*; *Bush* v. *New Orleans Parish*, *supra*; *James* v. *Almond*, *supra*; *James* v. *Duckworth*, *supra*.

Swimming pools and parks are not schools. Hence, *Tonkins* v. *City of Greensboro*, 276 F. 2d 890 (4th Cir. 1960) and *City of Montgomery* v. *Gilmore*, 277 F. 2d 364 (5th Cir. 1960), are inapposite. Here, the state is fully involved in the educational process and in the maintenance, operation, and supervision of public schools now operating throughout the state. [15] Certainly, there is no decision hold-

[15] "The public free school system", declares § 22-2, Code of Virginia, 1950 "shall be administered by a State Board of Education, * * * a Superintendent of Public Instruction, division superintendents of schools, and county and city school boards." The State Board under § 22-31 (this and all ensuing citations are to the Code of Virginia, 1950) prescribes the qualifications for division superintendents who are appointed by the local boards from a list of eligible persons certified by the State Board, § 22-32, and who receive a salary not less than a minimum set by the state law, of which the State contributes sixty per cent. § 22-37.

Moreover, the State Board prescribes rules and regulations for the conduct of high schools, requirements for admission, and conditions upon which puplis may attend such schools. § 22-191. It examines (§ 22-202) and certifies teachers (§ 22-204), and local boards, subject to some exceptions, may employ only teachers so certified. § 22-204. It adopts rules and regulations governing the purchase (§ 22-295) and selection of textbooks. § 22-296. The State has appropriated 45 million dollars to aid counties and cities in construction of needed public school buildings and in the development of vocational education. § 22-146.1 *et seq.*

The power and duties of local school boards are prescribed in detail by § 22-45, *et seq.* The subjects to be taught in the elementary grades are specified in § 22-233 to § 22-238. Article IX, § 129 of the State Constitution directs that "the General Assembly shall establish and maintain an efficient system of public free schools throughout the State." See also Va. Code §§ 22-5; 22-21; 22-25; 22-30.

ing that a state agency may abandon the public schools for the purpose of avoiding compliance with the law of the land, and to the extent that *Tonkins* and *City of Montgomery* are authority to the contrary, they promote confusion and conflict. Thus, the issue ought to be conclusively resolved and determined by this Court.

It is clear that petitioners' right to equal protection of the laws is violated when they are denied equality of educational opportunity through access to nonsegregated education solely because of their race and residence in Prince Edward County. See *Bush* v. *Orleans Parish School Board, supra.*

As was stated in *James* v. *Almond* at page 337: "no one public school or grade" can be closed in one part of the state or in a particular community "to avoid the effect of the law of the land", while "other public schools or grades remain open", as long as the state directly or indirectly maintains and operates a public school system or participates in any way in its management. See in accord, *Aaron* v. *McKinley, supra; Hall* v. *St. Helena Parish,* 197 F. Supp. 649, 656 (E. D. La. 1961).

When *Harrison* v. *Day,* 200 Va. 429, 106 S. E. 2d 636 (1959), and *James* v. *Almond, supra,* were decided it was clear to the Supreme Court of Appeals of Virginia and to the special statutory three-judge District Court that Virginia maintained and operated a statewide system of public education. At that time, Prince Edward County was an integral part of the state system. It is of no moment whether a duty to provide a free public education evolves upon the state in lieu of the county's failure to do so. The controlling factor is that public education is being maintained and offered in other parts of Virginia, while it is being denied in Prince Edward County. Whether this discrimination relates to geographical placement (see *Gomillion* v. *Lightfoot,* 364 U. S. 339; *Baker* v. *Carr,* 369 U. S. 186, or to race or color differentiation (*Brown*

v. *Board of Education, supra*), it raises a Fourteenth Amendment question, determination of which is the appropriate province of the federal courts.

(b). The trial court enjoined payment of state and county tuition grants to permit children to attend private, nonsectarian schools in the county and invalidated the allowance of tax credits for contributions to such schools, for only so long as public schools remain closed. Petitioners appealed to the court of of appeals the limited scope of the injunctive relief granted and raise its validity in this petition.

In *Cooper* v. *Aaron, supra*, this Court said at page 19: "state support of segregated schools through any arrangement, management, funds or property" violated the prohibitions of the Fourteenth Amendment. That the tution grant program, promulgated in Section 22-115.29 *et seq.*, of the Code of Virginia, 1950, as amended, was designed to meet the problems posed by the constitutional requirement that segregated public schools be eliminated, is a matter of public record. Considering the participation of state agencies and funds in the "private" school system provided for white children in Prince Edward County, the question raised by the court below, whether the state is operating a "state-wide, centralized system of schools" (Appendix A at page 14a) is not an adequate buttress for further delay in determining when declared federal rights will be accorded. Clearly, state policy cannot and should not be used as an instrumentality to evade or defeat the command of the Constitution.

It is well settled that acts generally lawful may become unlawful when done to accomplish unlawful ends. *Western Union Tel. Co.* v. *Foster*, 247 U. S. 105; Cf. *Gomillion* v. *Lightfoot, supra.* It is equally clear, petitioners respectfully submit, that under the Fourteenth Amendment, tuition grants, tax credits or similar devices used, or capable of use, to impede or frustrate an effective and realistic transi-

tion from a segregated school system to one not based upon considerations of color should be enjoined, without regard to whether public schools are closed. This must be so, or else a situation could obtain in which public schools were operated for Negro children, while the white children, whose tutiion was payed for by public moneys in the form of tuition grants, attended private, non-profit, nonsectarian schools. This is not our case, but it does not take much imagination to anticipate this as the next step, provided respondents are ordered to maintain a public school system.

(c). Decisional authority since *Brown* v. *Board of Education, supra* is persuasive that protracted litigation assists in the devising of infinite means to delay and to avoid the constitutional requirement of unsegregated public education. Judicial procedural doctrine must not become accessorial to the persistant denial of previously adjudicated constitutional rights. Important issues, imperative of determination, are raised by this case and whatever may, in other circumstances, be the merit of the doctrine of federal abstention, too much stress cannot be placed on the fact that these proceedings for vindication of the rights of Negro children to equal educational opportunities are still pending in the federal courts after 12 years of litigation. The district court assumed jurisdiction of the cause in 1951, and such assumption gave the federal courts power to determine all the questions involved. *Railroad Commission* v. *Pacific Gas & Electric Co.*, 302 U. S. 388, 391; *Wofford Oil Co.* v. *Smith*, 263 Fed. 396, 403 (M. D. Ala. 1920), appeal dismissed, 256 U. S. 705. These factors, which in themselves set this case apart, cannot be overlooked or discounted, in arriving at an appropriate solution to this controversy.

After 12 years of litigation, it is time all issues are settled and settled with finality. For the federal courts to refuse, at this late date, to resolve this controversy amounts to federal abdication, not federal abstention. See *McNeese* v. *Board of Education, supra.*

2. This cause is of great public importance and should be reviewed and determined by this Court. In 1951, as aforesaid, Negro children in Prince Edward County commenced a lawsuit designed to establish their right and the right of other Negro children to equality of education, unburdened by discrimination based upon the accident of race. Those rights have since been clearly and conclusively vindicated by this Court in *Brown* v. *Board of Education, supra; Cooper* v. *Aaron, supra,* and most recently in *Goss* v. *Board of Education,* 373 U. S. 683. Indeed, in *Watson* v. *Memphis,* 373 U. S. 526, this Court made clear that the "deliberate speed" proviso enunciated in *Brown* was not intended as a euphemism for indefinite delay in eliminating racial barriers in schools.

Yet, twelve years after this cause was instituted, nine years after the law of the case was determined and eight years after an implementation formula was announced, no Negro child in the county has benefited in any way from those decisions. The original complainants and many of the subsequent intervenors are no longer of public school age. Cherished rights have been irretrievably lost. While this personal tragedy may be rationalized as an evil incidental to any attempted social transformation, the protracted nature of these proceedings, the successful defiance of the Constitution by respondents, and the apparent helplessness, failure or refusal of the federal judiciary to afford any measure of effective relief, necessarily, undermines confidence in the administration of justice in our courts. Since the very matrix of our system is adherence to the rule of law, this cause raises questions of national consequence which necessitate the intervention of this Court.

Moreover, not only have respondents successfully frustrated vindication of the rights of petitioners and their predecessors to access to nonsegregated public education, but during the past five years, they denied Negro children access to all public education. Thus, in addition to the burdens of race, with its unrelenting pressures which tend

to relegate these petitioners as a class to a position of subservience, there is added the tragic encumbrance of ignorance. The closing of the schools in Prince Edward County, in callous disregard of public responsibility, marks one of the most shameful chapters in the history of American race relations.

Education is one of the most important functions of government today. It is essential to the perdurance of democratic institutions, necessary for our survival as an open society or, indeed, as any society at all.

As this Court pointed out in *Brown* at page 493:

> "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

The opportunties and benefits which accrue to a child upon receipt of an education have been denied to Negro children in Prince Edward County since June, 1959, because respondents concluded, rather than accord petitioners their constitutional right to a public school education on a nonsegregated basis, that they would deny educational opportunities altogether. No value ranks higher on respondents' scale than the right to practice and enforce racial segregation. Since that practice could no longer be enforced in public schools, public education was eliminated. At the same time, the Prince Edward School Foundation, tuition grants and tax credits were readied to make

certain that no loss in educational benefits should befall the white child.

Thanks to the Government of the United States, formal, standardized education has been provided Negro children in the county since September, 1963, under private auspices. While this arrangement, undoubtedly, will be advantageous to some Negro children in the county, it does not meet the constitutional issues raised in this petition.

No person who asserts, as petitioners do, a valid and conclusively defined constitutional claim should be without redress in the federal courts. In view of the protracted nature of this litigation, the fundamental importance of its resolution to petitioners and to the country at large, it is urgently and respectfully requested that this petition and all issues involved herein should be disposed of in such convenient haste, as will give respondents sufficient time to make whatever arrangements are necessary to reopen the public schools, if it is determined that they must, and begin operation of a nonsegregated public school system by September, 1964.

CONCLUSION

Wherefore, for the reasons hereinabove stated, it is respectfully submitted that this petition should be granted.

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APPENDIX A

Opinion of United States Court of Appeals Filed August 12, 1963

HAYNSWORTH, Circuit Judge:

Transmuted, this old case, in its new flesh and pregnant with questions, comes again before us.

As Davis, et al., v. County School Board of Prince Edward, et al., it began in 1951 as a suit to effect the desegregation of the public schools maintained by Prince Edward County, Virginia. It was one of the four school cases decided by the Supreme Court of the United States in Brown v. Board of Education, 347 U. S. 483. As Allen, et al. v. County School Board of Prince Edward County, Virginia, et al., the case was again before this Court in 1957 [1] and, still again, in 1959. [2]

In our opinion filed in May 1959, when this case was last here, we directed the entry of an injunction requiring the then defendants to receive and consider, on a nondiscriminatory basis, applications by Negro pupils for enrollment in high school for the school term beginning in September 1959. We also directed the entry of an order requiring the School Board to make plans for the elimination of discrimination in the admission of pupils to the elementary schools at the earliest practicable date. On remand to the District Court, no order was entered until April 22, 1960, when the District Court entered a formal order requiring the immediate elimination of discrimination in the admission of Negro applicants to high schools and the formulation of plans for the elimination of discrimination in the admission of applicants to elementary schools. Meanwhile, however, all public schools in Prince Edward County has been closed.

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[1] 249 F. 2d 462.
[2] 266 F. 2d 507.

Appendix A

During the summer of 1959, the Board of Supervisors of Prince Edward County, though it had received from the School Board budgets and estimates of the cost of operating the schools for the 1959-1960 school year, did not levy taxes or appropriate funds for the operation of the schools during that year. Though certain funds have come into the hands of the School Board, out of which it has been able to meet certain maintenance and insurance expenses and debt curtailment, it has received no funds with which it could operate the schools, for, annually, the Board of Supervisors has failed, or declined, to levy taxes or appropriate funds for the operation of the schools.

In September 1960, the present plaintiffs obtained leave to file a supplemental complaint, which was supplanted by an amended suplemental complaint filed in April 1961. By these supplemental pleadings, the County Board of Supervisors, the State Board of Education and the State Superintendent of Education were brought in as additional defendants. By the amended supplemental complaint, the plaintiffs sought an order requiring the defendants to operate an efficient system of free public schools in Prince Edward County, forbidding tuition grants to pupils attending private schools practicing segregation, forbidding tax credits to taxpayers for contributions to private schools practicing segregation, and forbidding a conveyance or lease of any property of the School Board of Prince Edward County to any private organization.

The District Court entered an injunction against payment of tuition grants to pupils attending the schools operated by the Prince Edward School Foundation and against the allowance of tax credits by Prince Edward County on account of contributions to that Foundation. Initially, it abstained from deciding the questions of state law upon which the reopening of the free public schools depended, but, after the plaintiffs had aborted the effort to have the

relevant questions decided by the state courts,[3] the District Court undertook to decide them itself. It ordered the schools reopened, but postponed the effectiveness of that order pending this appeal. There was no evidence that anyone had any idea the school buildings and property owned by the School Board would be sold or leased, and no order was entered affecting their disposition.

For the District Court to get to the merits, it had to bypass a number of preliminary questions, including the very troublesome question arising under the Eleventh Amendment, all of which are brought up before us. On the merits of each of the three main issues, the parties

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[3] The plaintiffs applied to The Supreme Court of Appeals of Virginia for a writ of mandamus to compel the Board of Supervisors to levy taxes and appropriate funds for the operation of public schools. The District Judge saw copies of the pleadings and, apparently, was of the opinion they put in issue all relevant questions. In their printed brief, however, the plaintiffs disclaimed the presence of any federal question, with the result that the court decided only one narrow issue. It held mandamus unavailable because, it concluded, the Board of Supervisors' function was legislative and discretionary, not ministerial, Griffin, et al. v. Board of Supervisors of Prince Edward County, 203 Va. 321, 124 S. E. 2d 227. It did not consider whether or not Virginia or any of its agencies has an affirmative duty to operate free public schools in Prince Edward or whether it can operate public schools elsewhere while those in Prince Edward remain closed. It did not consider many of the questions of state law which underlie those two ultimate questions.

Later the defendants, or some of them, brought an action for a declaratory judgment in the Circuit Court of the City of Richmond. The plaintiffs here were named defendants there, and one of their attorneys was appointed guardian ad litem for the infants. On March 21, 1963 Judge Knowles filed an opinion in which the major questions are resolved in the favor of the agencies and officials of the Commonwealth and county. An appeal has been taken to The Supreme Court of Appeals of Virginia and will be heard in October, a few months hence. See Southern School News, July 1963, Vol. 10, No. 1, page 12.

advanced innumerable alternate offenses and defenses, but it is obvious that the answer on the merits, in one instance exclusively and in other instances largely, rests upon interpretations of state law. It is also apparent that a proceeding in the state courts will avoid most of the technical procedural difficulties which must be disposed of before the merits can be determined in this action. Under these circumstances, we think the District Court properly decided, in the first instance, that it should abstain from deciding the merits of the principal issue until the relevant questions of state law had been decided by the state courts. We think it should have adhered to its abstention when resolution of the state questions by state courts was delayed because the plaintiffs, themselves, chose to withdraw them from state court consideration. We think too that abstention on the other two issues, where the answers are so closely related to the principal issue, was the proper course. Insofar as there are federal questions present which are independent of state law, as will presently appear, we conclude that the plaintiffs have shown no ground for relief, so that abstention is not inappropriate.

In 1959, after the Board of Supervisors of Prince Edward County failed to levy taxes for the operation of the schools during the school year 1959-1960, a corporation known as Prince Edward School Foundation was organized for the purpose of operating private schools in the county. It was launched by private contributions of $334,712.22. With the receipt of tuition charges [4] and continuing private contributions, it has successfully operated primary and secondary schools in Prince Edward County which are attended solely by white pupils. It has used none of the facilities of the School Board. Until the District Judge

[4] There were no tuition charges during the first year, 1959-1960. That year all expenses were met out of contributions. Since then tuition has been charged.

enjoined their payment, pupils attending schools of the Prince Edward School Foundation, generally, received tuition grants paid jointly by Virginia and Prince Edward County, which approached but did not equal the tuition charges they had to pay.

Negro citizens of Prince Edward County at first made no effort to provide schools for their children. They declined proffered assistance in such an undertaking. Some of their children obtained admission to public schools in other counties of Virginia and, since 1960, obtained, or were eligible for, tuition grants when they did so. The great majority of Negro children, however, for a time, went with no schooling whatever. Later, certain "training schools" were established and a substantial number of Negro pupils, but far from all, have attended those training schools.

On the principal issue, the question whether the plaintiffs have a judicially enforceable right to have free public schools operated in Prince Edward County, the plaintiffs contend that the closure of the schools, taken either alone or in conjunction with the subsequent formation of the Prince Edward School Foundation and its operation of private schools for white pupils only, was the kind of "evasive scheme" for the perpetuation of segregation in publicly operated schools which was condemned in Cooper v. Aaron, 358 U. S. 1. The United States, as *amicus curiae* advances a different principle, contending that there is a denial of the Fourteenth Amendment's guarantee of equal protection of the laws when the Commonwealth of Virginia suffers the schools of Prince Edward County to remain closed, while schools elsewhere in the state are operated.

As to the plaintiffs' contention, it may be summarily dismissed insofar as it is viewed as a contention that the Fourteenth Amendment requires every state and every

school district in every state to operate free public schools in which pupils of all races shall receive instruction. The negative application of the Fourteenth Amendment is too well settled for argument.[5] It prohibits discrimination by a state, or one of its subdivisions, against a pupil because of his race, but there is nothing in the Fourteenth Amendment which requires a state, or any of its political subdivisions with freedom to decide for itself, to provide schooling for any of its citizens. Schools that are operated must be made available to all citizens without regard to race. but what public schools a state provides is not the subject of constitutional command.

The plaintiffs' theory may also be summarily dismissed insofar as it is viewed as a contention that the closure of the schools was a violation of the order of the District Court entered in compliance with the direction of this Court. The injunctive order, entered when the School Board and its Division Superintendent were the only defendants, required them to abandon their racially discriminatory practices. Without funds, they have been powerless to operate schools, but, even if they had procured the closure of the schools, they would not have violated the order for they abandoned discriminatory admission practices when they closed all schools as fully as if they had continued to operate schools, but without discrimination.

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[5] Byrd v. Sexton, 8 Cir., 277 F. 2d 418, 425; Kelley v. Board of Education of City of Nashville, 6 Cir., 270 F. 2d 209, 228-229; School Board of City of Newport News v. Atkins, 4 Cir., 246 F. 2d 325, 327; Avery v. Wichita Falls Independent School District, 5 Cir. 241 F. 2d 230, 233; Wheeler v. Durham City Board of Education. M. D. N. C., 196 F. Supp. 71, 80, reversed on other grounds, 309 F. 2d 630; Dove v. Parham, E. D. Ark., 181 F. Supp. 504, 513 affirmed in part, reversed in part, 271 F. 2d 132; McKissick v. Durham City Board of Education, M. D. N. C., 176 F. Supp. 3, 14: Thompson v. County School Board of Arlington, E. D. Va., 144 F. Supp. 239, affirmed 240 F. 2d 59; Briggs v. Elliott, E. D. S. C. (Three Judge Court) 132 F. Supp. 776, 777.

Appendix A

The impact of abandonment of a system of public schools falls more heavily upon the poor than upon the rich. Even with the assistance of tuition grants, private education of children requires expenditure of some money and effort by their parents. One may suggest repetition of the often repeated[6] statement of Anatole France, "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread." That the poor are more likely to steal bread than the rich or the banker more likely to embezzle than the poor man, who is not entrusted with the safekeeping of the moneys of others, does not mean that the laws proscribing thefts and embezzlements are in conflict with the equal protection provision of the Fourteenth Amendment. Similarly, when there is a total cessation of operation of an independent school system, there is no denial of equal protection of the laws, though the resort of the poor man to an adequate substitute may be more difficult and though the result may be the absence of integrated classrooms in the locality.

This we held in a different context in Tonkins v. City of Greensboro, 4 Cir., 276 F. 2d 890, affirming 162 F. Supp. 549. Faced with the necessity of desegregating the swimming pools it owned, the City of Greensboro, North Carolina, chose instead to sell them. Upon findings that the sale of the pool, which the City had theretofore reserved for use by white people only, was bona fide, it was held that there had been no denial of the constitutional rights of the Negro plaintiffs, though the pool was thereafter operated on a segregated basis by its private owners.[7]

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[6] See Griffin v. Illinois, 351 U. S. 12, 23, 76 S. Ct. 585, 593, 100 L. Ed. 891; Hall v. St. Helena Parish School Board, E. D. La. (Three Judge Court) 197 F. Supp. 649, 655.

[7] See also City of Greensboro v. Simkins, 4 Cir., 246 F. 2d 425.

Similarly, when a state park was closed during pendency of an action to compel the state to permit its use by Negroes on a nondiscriminatory basis, we held that closure of the park mooted the case requiring its dismissal.[8]

Other courts have clearly held that a municipality which had been ordered to desegregate facilities which it had operated, may abandon the facilities without violating the injunctive order or the rights of the Negro plaintiffs.[9] The only limitation of the principle is that a municipality may not escape its obligations to see that the public facilities it owns and operates are not open to everyone on a nondiscriminatory basis by an incomplete or limited withdrawal from the operation of them. If the municipality reserves rights to itself in disposing of facilities it formerly owned and operated, subsequent operation of those facilities may still be "state action."[10]

Nothing to the contrary is to be found in James v. Almond.[11] There, the Court had ordered the admission of seventeen Negro pupils into six of Norfolk's schools theretofore attended only by white pupils. Under Virginia's "Massive Resistance Laws," the Governor of Virginia thereupon seized the six schools, removed them from Norfolk's school system and closed them. All other schools in Norfolk and elsewhere in Virginia remained open. It was held, of course, that the statutes under which the Governor acted were unconstitutional, for Virginia's requirement that all desegregated schools be closed while segregated schools remained open was a denial of equal protection of the laws. There was no suggestion that Virginia might

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[8] Clark v. Flory, 4 Cir., 237 F. 2d 597.

[9] Hampton v. City of Jacksonville, 5 Cir., 304 F. 2d 319; Gilmore v. City of Montgomery, 5 Cir., 277 F. 2d 364; and see Willie v. Harris County, E. D. Texas, 202 F. Supp. 549.

[10] Hampton v. City of Jacksonville, 5 Cir., 304 F. 2d 320.

[11] E. D. Va. (Three Judge Court) 170 F. Supp. 331.

not withdraw completely from the operation of schools or that any autonomous subdivision operating an independent school system might not do so.

The decision in Hall v. St. Helena Parish School Board[12] is not a departure from the principle. There, it appeared that, confronted with court orders to desegregate schools in certain parishes in Louisiana, the Governor of that State called an extraordinary session of the Legislature, which enacted a number of statutes designated to frustrate enforcement of the court's orders. One of the statutes provided for the closure of all schools of a parish upon a majority vote of the parishioners. It was accompanied by other statutes providing for the transfer of closed schools to private persons or groups, providing for educational cooperatives and regulating their operations, providing tuition grants payable directly to the school and not solely to the pupils and their parents, providing for general supervision of the "private schools" by the official state and local school boards, and providing, at state expense, school lunches and transportation for pupils attending the "private schools." Construing all these statutes together, as it was required to do, the Court, with abundant reason, concluded that the statutes did not contemplate an abandonment of state operation of the schools but merely a formal conversion of them with the expectation that the schools would continue to be operated at the expense of the state and subject to its controls. Desegregation orders may not be avoided by such schemes, but there is nothing in the *Hall* case which suggests that Louisiana might not have withdrawn completely from the school business. It was only because it had not withdrawn that the statutes which composed its evasive scheme of avoidance were struck down.

The plaintiffs largely content themselves with assertions that closure of the schools was motivated by the filing of

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[12] E. D. La. (Three Judge Court) 197 F. Supp. 649.

our opinion in May 1959, from which it was apparent that the District Court would be required to enter a desegregation order. They emphasize a resolution adopted in 1956 by a predecessor Board of Supervisors expressing an intention to levy no tax and appropriate no funds for the operation of desegregated schools.[13] More broadly, they contend that closure of the schools, with the effect of avoiding the operation of integrated schools, is a violation of the Fourteenth Amendment or of the injunctive order.

Facially, what we have said will dispose of the plaintiffs' contention, but the matter does not necessarily end there. As we have seen, if Virginia or Prince Edward County can be said to be still operating schools through the Prince Edward School Foundation, then the principles of Cooper v. Aaron, 358 U. S. 1, would require a remedial order.[14] If Prince Edward County has not completely withdrawn from the school business, then it cannot close some schools while it continues to operate others on a segregated basis.[15]

The plaintiffs do not contend that Prince Edward County or Virginia had a hand in the formation of the Prince Edward School Foundation. There is no suggestion that any agency, or official, of Virginia, or of Prince Edward County, has any authority to supervise the operation of the schools of the Prince Edward School Foundation, except insofar as Virginia exercises a general police supervision over all private schools and except that Virginia

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[13] One of the questions much debated is whether a court may inquire into the motive of a legislative body when it considers the constitutionality of the legislative body's act or inaction.

[14] See Hall v. St. Helena Parish School Board, E. D. La. (Three Judge Court) 197 F. Supp. 649; Hampton v. City of Jacksonville, 5 Cir., 304 F. 2d 320; City of Greensboro v. Simkins, 4 Cir., 246 F. 2d 245.

[15] James v. Almond, E. D. Va. (Three Judge Court) 170 F. Supp. 331.

accredited the schools of the Foundation when they met the requirements applicable to all private schools. Indeed, during the first year of operation, the schools of the Foundation appear to have been as independent of governmental authority as any sectarian or nonsectarian private school in Virginia.

Beginning with the school year 1960-1961, pupils attending schools of the Foundation did receive tuition grants. One of Virginia's statutes [16] providing for the tuition grants authorized participation by the counties. If a particular county does not participate in the tuition grant program, the state will pay the maximum allowable grant but will deduct a portion of its payment from other state funds distributed for purposes unrelated to schools to the nonparticipating county.[17] It was apparently for that reason that in 1960 the Board of Supervisors of Prince Edward County provided for tuition grants which would take the place of a portion of the state grant but would not supplement the funds otherwise available to the pupil. In its effect upon Prince Edward County, its participation in the state-wide program of tuition grants amounted to no more than taking dollars from one of its pockets and putting them into another. As for pupils who were residents of Prince Edward County attending schools of Prince Edward Foundation, or any private school, or a public school outside of the county, they got no more by reason of the county's participation in the program.

In 1960, the Board of Supervisors of Prince Edward County also adopted an ordinance providing for credits to taxpayers, not exceeding twenty-five per cent of the total tax otherwise due, for contributions to nonsectarian schools not operated for profit located in Prince Edward County, or to be established and operated in that county

[16] Code of Virginia § 22-115.31 (1960 Cum. Supp.).

[17] Code of Virginia § 22-115.34 (1960 Cum. Supp.).

during the ensuing year. During the school year 1960-1961, credits aggregating $56,866.22 were allowed by Prince Edward County on account of contributions made to the Foundation.

The allowance of such tax credits appear to be an indirect method of channeling public funds to the Foundation. They are very unlike Virginia's program of tuition grants to pupils which has a lengthy history.[18] The allowance of such tax credits makes uncertain the completeness of the County's withdrawal from the school business. It might lead to a contention that exclusion of Negroes by schools of the Foundation is county action. Their allowance, however, during the second [19] of the four years that the Foundation has operated its schools does not require a present finding on this record that the County is still in the school business, and that the acts of the Foundation are its acts.

Bearing in mind the fact that the Foundation established and operated its schools without utilization of public facilities and, during the first year, without any direct or indirect assistance of public funds, and the clear showing of the independence of the Foundation from the direction and control of the defendants, the allowance of the tax credits is at least equivocal. Inferences of power to influence, if

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[18] Virginia's tuition grant program had its first beginning many years ago in aid of children who had lost their fathers in World War I. It was expanded to include others until 1955 when the Supreme Court of Appeals of Virginia held that the tuition grants were in violation of Virginia's Constitution when given to pupils attending private schools. Almond v. Day, 197 Va. 419, 89 S. E. 2d 851. Section 141 of Virginia's Constitution was promptly amended to overturn the result of Almond v. Day. The statutes authorizing Virginia's present, broad program of tuition grants were enacted in 1960.

[19] In the first year of the Foundation's operation, the County had no provision for any tax credits for contributions. After the second year, no such credits were allowed because of the Court's order.

not to control, may follow such encouragement of contributions, though the allowance of income tax deductions by the State and United States for contributions to religious and charitable organizations is not thought to make state or nation a participant in the affairs and operations of the beneficiaries of the contributions. Indeed, their allowance has come in recognition of public interest in encouragement of private contributions to religious, educational and charitable institutions and organizations. Here, however, the allowance of the tax credit comes in a more particularized context, and that context is not complete without consideration of Virginia's tuition grants.

As indicated above, Virginia's tuition grants had a considerable history. That program has not been attacked in this case. Its constitutionality has not been questioned. Elsewhere, apparently, it has not been utilized to circumvent the segregation of public schools. In the school year just closed, thirty-one school districts in Virginia were desegregated to some degree.[20] The basic program of tuition grants, however, its antecedents and its operation and effect were not examined by the court below.[21]

Moreover, the effect of tax credits and tuition grants ought to be determined only in the light of the correlative duties and responsibilities of the Commonwealth and the County in connection with the operation of schools in the County. What they are and how they are distributed turn entirely upon the proper construction of a number of constitutional and statutory provisions of the Commonwealth. If, as the District Court found, Virginia's Constitution requires the Commonwealth as such to open and operate schools in Prince Edward County, what Prince Edward

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[20] Southern School News, June 1963, Vol. 9, No. 12, page 1.

[21] It enjoined payment of tuition grants by the state because it construed the state statutes as not authorizing them, a construction which we find, at least, dubious.

County does in the allowance of tax credits for contributions to otherwise independent educational institutions may be of little moment. On the other hand, if Prince Edward County should be held to have a duty under state law to operate free public schools, then its allowance of tax credits might be a basis for a conclusion, in light of the tuition grant program, that it was undertaking to discharge its duty by indirection and, in effect, was operating the schools of the Foundation.

Such a determination can be made only when the underlying questions of state law have been settled.

The two branches of the principal issue are closely interrelated. As appears above, the question of whether or not Prince Edward County, or Virginia, has such a hand in the operation of the schools of the Foundation as to result in a Fourteenth Amendment requirement that they operate free, public schools on a nondiscriminatory basis for all pupils in the county is dependent, in large measure, upon a determination of Virginia's distribution of authority, duty and responsibility in connection with the schools and their control and operation. Applicability of the principle advanced by the United States as *amicus curiae* depends entirely upon the answers to those questions of state law, for no one questions the principle that if Virginia is operating a state-wide, centralized system of schools, she may not close her schools in Prince Edward County in the face of a desegregation order while she continues to operate schools in other counties and cities of the Commonwealth. Application of the constitutional principle turns solely upon a determination, under state law, of Virginia's role in the operation of public schools in Virginia.[22]

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[22] Here, the Eleventh Amendment question arises. The more the United States asserts that Virginia's Constitution places affirmative, but neglected duties upon Virginia's General Assembly and State Board of Education, the closer it skirts the Eleventh Amendment's prohibition against suits in the courts of the United States by citizens against a state.

Appendix A

The answers to these questions are unresolved and unclear. On the one hand, the United States points to Section 129 of Virginia's Constitution, which provides, "The General Assembly shall establish and maintain an efficient system of public, free schools throughout the state," and to those constitutional and statutory provisions providing for a State Board of Education and a Superintendent of Public Instruction, and defining their duties and responsibilities. On the other hand, the defendants point to Section 133 of Virginia's Constitution which provides that supervision of schools in each county and city shall be vested in a school board and to other constitutional and statutory provisions which, unquestionably, vest large discretionary power in local school boards and in the governing bodies of the counties and cities in which they function.

By Section 130 of the Constitution, the State Board of Education "has general supervision of the school system." It has the power to divide the state into school divisions, though no school division may be smaller than one county or one city. When a Division Superintendent of Schools is to be appointed, the State Board of Education certifies to the local board a list of qualified persons, and the local board may appoint anyone so certified. It selects and approves textbooks for use in the schools. It is required to manage and invest certain school funds of the state, and the General Assembly is empowered to authorize the State Board to promulgate rules and regulations governing the management of the schools.

Section 135 of Virginia's Constitution requires the application of receipts from certain sources to schools of the primary and grammar grades. These "constitutional funds" are apportioned among the counties and cities according to school population. In addition, the General Assembly is authorized to appropriate other funds for school purposes, and those funds are apportioned as the

General Assembly determines. Section 136 of the Constitution authorizes the counties and towns to levy taxes and appropriate funds for use "in establishing and maintaining such schools as in their judgment, the public welfare may require."

The General Assembly of Virginia has adopted the consistent practice of appropriating funds, other than the "constitutional funds," for distribution to the counties and cities for school purposes. Such appropriations are conditioned upon local appropriations. Thus, before the schools in Prince Edward County were closed, the local school board received its proportion of the constitutional funds, and, in addition, it received whatever funds were appropriated by Prince Edward's Board of Supervisors, plus matching funds from the state which became payable because of the local appropriation. Since the schools were closed, the Prince Edward County School Board received no funds from the state during the school year 1959-1960. It has received its proportionate part of the constitutional funds, but those only, in subsequent years, and these are the funds it has used to keep its physical properties in repair and insured, but they have been insufficient to enable it to do anything else.

This arrangement, the defendants says, is a local option system under which each county is authorized to determine for itself whether or not it will operate any schools and, if so, what schools and what grades. They emphasize the provision of Section 136 of the Constitution which gives the local authorities the right to appropriate funds "in establishing and maintaining such schools as, in their judgment, the public welfare may require," which is limited by a provision that, until primary schools are operating for at least four months per year, schools of higher grades may not be established. This, they say, clearly authorizes and

requires what is done in practice. The local school board, it is said, determines what schools and facilities are required. It budgets the estimated costs of their maintenance and operation, and submits its estimates to the local Board of Supervisors. The Board of Supervisors may not overturn particular determinations of the school board, but it, say the defendants, has an unfettered discretion in levying taxes and appropriating funds. It may appropriate funds equal to the school board's budgetary estimate, but it also may appropriate less or nothing at all. If the Board of Supervisors appropriates nothing for use by the school board, then the matching state funds are unavailable and the schools cannot be operated.

Among Virginia's statutes may be found clear provisions for local option. Under Sections 16.1-201-2 of the Virginia Code, a county may elect to establish juvenile detention facilities. If it does so, the state will contribute funds to meet, in part, the cost of construction and operation. Under Section 32-292, et seq., a county may elect to participate in a program of state-local hospitalization. If a county elects to do so, the state, with certain limitations, will contribute one-half the cost of such hospitalization. The defendants suggest that there is no unconstitutional geographic discrimination in such local option programs, though one or more counties may not elect to participate in them.

Federal analogies readily come to mind. The United States makes available to participating states which enact prescribed legislation, grants for unemployment compensation administration.[23] Under the National Defense Education Act,[24] federal funds are made available to localities conducting in their schools approved programs of science,

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[23] 42 U. S. C. A. § 501, et seq.

[24] 20 U. S. C. A. § 401, et seq.

mathematics and foreign languages. It is suggested that there is no geographic discrimination in the provision for such optional grants, though a state or locality may exercise its option not to participate.

Such local option provisions as those the defendants think analogous are constitutionally unassailable.[25] When a state undertakes to encourage local conduct of educational or social programs by making matching funds available to participating localities, there is no discrimination against nonparticipating localities. Since every locality may participate if it wishes to do so, and the state funds are available to each upon the same conditions, the state is even-handed.

The question here, however, is whether Virginia's school laws establish an arrangement within the local option principle the defendants advance. If Section 129 of Virginia's Constitution imposes upon the General Assembly the duty to provide operating, free, public schools in every county, as the United States contends, its election to establish a system having features of a local option arrangement may be permissible under state law only so long as schools are operated in every county. On the other hand, if Section 129 of Virginia's Constitution, construed in the light of other constitutional provisions, requires of the General Assembly only that it provide for a system of education under which counties and cities are authorized to establish and maintain schools of their own with state assistance, then the principle which the defendants assert may be applicable. The answer is unclear. It requires interpretation and harmonization of Virginia's Constitution and statutes.

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[25] Salsburg v. Maryland, 346 U. S. 545; Ohio ex rel. Lloyd v. Dollison, 194 U. S. 445; Rippey v. Texas, 193 U. S. 504; Ft. Smith Light & Traction Co. v. Board of Improvement, 274 U. S. 387.

The question is unresolved. Virginia's Supreme Court of Appeals has considered her school laws in a number of cases, but none of them settle the question here.

In School Board of Carroll County v. Shockley, 160 Va. 405, 168 S. E. 419, the Court held unconstitutional an act of the General Assembly requiring the imposition of local taxes and the use of the proceeds in the construction of a particular school.[26] In Board of Supervisors of Chesterfield County v. School Board of Chesterfield County, 182 Va. 266, 28 S. E. 2d 698, the Court said that the local school board is "to run the schools," and it alone has the power to determine how locally appropriated funds are to be spent. In Griffin v. Board of Supervisors of Prince Edward County, 203 Va. 321, 124 S. E. 2d 227, the Court held that in levying taxes and appropriating funds for school purposes, the Board of Supervisors exercised a legislative and discretionary function, and that it was not subject to mandamus. In Scott County School Board v. Board of Supervisors, 169 Va. 213, 193 S. E. 52, it had been held that mandamus was not available to a school board to compel the supervisors of its county to appropriate funds sufficient to cover the school board's estimates of the cost of school operation.

In none of those cases, however, has Virginia's Supreme Court of Appeals considered the requirements of Section 129 of the Constitution when schools cease to operate because the local Board of Supervisors levies no taxes and appropriates no funds for the purpose. That Court may conclude that, in light of the closure of the schools in Prince Edward County, Section 129 of the Constitution requires something more of the General Assembly or of the State Board of Education.

That conclusion, however, is not forecast by Harrison v. Day, 200 Va. 439, 106 S. E. 2d 636, in which Virginia's

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[26] See also Almond v. Gilmer, 188 Va. 1, 49 S. E. 2d 431.

Appendix A

Supreme Court of Appeals struck down Virginia's massive resistance laws. Nor is there anything in the Three-Judge Court decision of James v. Almond, E. D. Va., 170 F. Supp. 331, which approaches federal determination of this state question. There, the Governor seized and removed from the school system six of Norfolk's schools subject to desegregation orders. He acted under color of a state statute which required him to do so. In holding the statute unconstitutional the Court did not decide that all schools in Virginia were administered by the state on a state-wide, centralized basis. The seizure was clearly that of the Governor and the discrimination was inherent in the statute whether the schools were otherwise operated upon a local option basis or directly by the state. When the state acts to seize and close every school subject to a desegregation order, its sufferance of continued operation of other schools within its borders is as discriminatory as its direct operation of them.

These controlling questions of state law, uncertain and unsettled as they are, ought to be determined by the Supreme Court of Appeals of Virginia, which alone has the power to give an authoritative interpretation of the relevant sections of Virginia's Constitution and of her statutes. As it was so forcefully said in Railroad Commission of Texas v. Pullman Company, 312 U. S. 496, this Court cannot settle the state questions; it can do no more than predict what Virginia's Supreme Court of Appeals will do when the questions come before it. If we should hazard a forecast and it should be proven wrong, any present judgment based upon it will appear both gratuitously premature and empty when the state questions are authoritatively resolved in the state courts. Particularly is this true when, with so little to guide us, we cannot predict with any semblance of confidence how the several state questions will be ultimately resolved in the state courts. In such

circumstances, abstention until the state questions are determined is the proper course.[27]

Abstention, under the circumstances, is all the more appropriate because the case of County School Board of Prince Edward County, Virginia, et al. v. Griffin, et al., is already pending on the docket of the Supreme Court of Appeals of Virginia and will be heard by that Court in October. From a reading of the opinion of the Circuit Court of the City of Richmond in that case, it appears that the essential questions of state law upon which decision here turns are presented in that case and will be determined by that Court as it considers and adjudicates the same primary question tendered in this case, the existence of judicially enforceable rights in the plaintiffs to have the schools reopened. That state court proceeding had not been commenced when the District Judge acted on the primary question in this case. In abandoning his earlier decision to abstain, he referred to the fact that no such proceeding was pending or then contemplated. Had it been then pending, he probably would have awaited its outcome. The fact that a case, apparently ripe for decision, is now pending on the docket of Virginia's Supreme Court of Appeals, makes easier our conclusion that the controlling questions of state law, which govern the application of unquestioned constitutional principle, ought to be determined by the state courts, and that, when they may be so determined, the federal courts ought to abstain from constitutional adjudication premised upon their notions of state law which may or may not turn out to be accurate forecasts.

Accordingly, the judgments below will be vacated and the case remanded to the District Court, with instructions

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[27] Railroad Commission of Texas v. Pullman Company, 312 U. S. 496; Harrison v. N.A.A.C.P., 360 U. S. 167; Spector Motor Service, Inc. v. McLaughlin, 323 U. S. 101.

to abstain from conducting further proceedings until the Supreme Court of Appeals of Virginia shall have decided the case now pending on its docket entitled County School Board of Prince Edward County, Virginia, et al., v. Leslie Francis Griffin, Sr., et al., and that decision has become final, with leave to the District Court thereafter to entertain such further proceedings and to enter such orders as may then appear appropriate in light of the determinations of state law by the Supreme Court of Appeals of Virginia.

Vacated and remanded.

J. Spencer Bell, Circuit Judge, dissenting:

Because of the inordinate delays which have already occurred in this protracted litigation, I hasten, without exhausting the subject, to indicate the reasons for this dissent.

I think the order of the District Court should be implemented at once for either of two reasons, each of which is amply supported by the findings of fact and the conclusions of law set forth in the District Court's opinion. First, because the public school system of Virginia is maintained, supported and administered on a statewide basis by the Commonwealth of Virginia; therefore, the closure of the schools of this one county constitutes discrimination. Second, the defendants closed the schools solely in order to frustrate the orders of the federal courts that the schools be desegregated.

The plaintiffs assert a federal right guaranteed by the Constitution; the jurisdiction to determine this right is vested in the federal courts. A refusal to adjudicate this right would be violation of the courts' duty. *Monroe* v. *Pate*, 365 U. S. 167 (1961). The plaintiffs must not be re-

quired to exhaust their remedies in the state's courts before having their federal rights determined in the federal courts. *McNeese* v. *Board of Education*, 31 U. S. L. W. 4567 (decided June 3, 1963). The defendants have been given ample opportunity heretofore to have the state courts speak. In its opinion of July 25, 1962, the district court said:

> "... upon the further assurance of counsel for the Board of Supervisors of Prince Edward County (which assurance was given after conferring with the Attorney General of Virginia and counsel for the School Board of Prince Edward County) that he would file such a suit if the petitioners failed to do so, this court abstained from determining the issue, pending a final ruling by the Supreme Court of Appeals of Virginia."

In spite of this assurance the defendants not only failed to bring a suit for this purpose, but they deliberately failed to raise the issue in a suit brought by the plaintiffs to assert their rights under the Virginia Constitution. Finally, at long last, when the district court proceeded to declare the plaintiffs' rights under federal law, the defendants commenced the suit to raise the issue in the state courts, demanding that the federal courts further abstain. This is not abstention—this would be a humble acquiescence in outrageously dilatory tactics, and the district court was right to reject it. We have neither the duty nor the right to pressure the state courts to declare federal rights, and they are not bound by conscience or law to engage in a race with the federal courts to declare federal rights [1]. Courts are not self-activating, if the defendants here chose to refrain from seeking a state court determination until the

[1] The Supreme Court of Appeals of Virginia refused last June to put the case ahead on its calendar.

district court was finally forced to act, they should not now be heard to call for further abstention—when as the district court said on October 10, 1962: "Abstention would create an irreparable loss in the formal education of the children of Prince Edward County". Abstention is not sanctioned by any law—it is a court evolved doctrine of courtesy—it must not be used to frustrate the plain rights of litigants. To do so now under the present posture of this case is not abstention, it is abnegation of our plain duty.

A brief review of the record leaves no doubt whatsoever that the public schools of Virginia were established and are being maintained, supported and administered in accordance with state law, primarily on a statewide basis. I see no need to review in detail the evidence supporting that conclusion. The Constitution of the state compels the Legislature to appropriate funds for this purpose—funds derived from the taxation of Negroes as well as whites in Prince Edward and other counties. The Virginia Code provides that the public free school system shall be administered by a State Board of Education which is responsible for dividing the state into appropriate school divisions. The State Board prescribes the rules and regulations for conducting the high schools as well as the requirements for admission. A Superintendent of Public Instruction is appointed by the Governor. Local school boards are regulated to a great extent by state law. All power of enrollment or placement of pupils in the public schools is vested in a State Pupil Placement Board, whose members likewise are appointed by the Governor. I do not believe that it can be seriously argued that public education is not a state function in Virginia. This being true, since the state maintains and operates schools elsewhere in the state, its failure to do so in Prince Edward County, by permitting the County Board of Supervisors to close the schools for a discriminatory reason, violates the Fourteenth Amendment.

Appendix A

The district court's finding that Virginia is operating and maintaining a statewide system of schools not being clearly erroneous is binding on us. Indeed it is a fact so firmly established that we would be required to take judicial notice of it. That decision is buttressed by the decision of the three judge district court in *James* v. *Almond*, 170 F. Supp. 321, 337 (E. D. Va. 1959), wherein the court said:

> "Tested by these principles we arrive at the inescapable conclusion that the Commonwealth of Virginia, having accepted and assumed the responsibility of maintaining and operating public schools . . . [cannot close one or more because of segregation] . . . While the State of Virginia directly or *indirectly* maintains and operates a school system with the use of public funds, *or participates by arrangement or otherwise* in the management of such a school system [it may not close schools to avoid segregation]." (Emphasis added)

It is worthy of note that the Supreme Court of Appeals of Virginia points to the mandatory provisions of Section 129 of that state's Constitution, which provides: "The General Assembly shall establish and maintain an efficient system of public free schools throughout the State". *Griffin* v. *Board of Supervisors of Prince Edward Co.*, 203 Va. 321, 124 S. E. 2d 227.

Faced with the inescapable fact that the State of Virginia is maintaining and operating a statewide system of schools, the deeply abstruse and highly technical arguments about whether Virginia's laws permit a local unit to close its schools are academic under the Fourteenth Amendment. For this purpose the county is acting as an agency of the state, and the state may not directly or indirectly evade the

command of the Amendment. What the state could not do directly in *James* v. *Almond* it may not do indirectly in this case. In *Hall* v. *St. Helena Parish School Board*, 197 F. Supp. 649, aff'd 365 U. S. 569 (three judge court), the State of Louisiana attempted to set up a local option system to avoid a court order to desegregate. The court struck down the law and forbade the practice. In doing so it said:

> "The equal protection clause speaks to the state. The United States Constitution recognizes no governing unit except the federal government and the state. A contrary position would allow a state to evade its constitutional responsibility by carve-outs of small units. At least in the area of declared constitutional rights, and specifically with respect to education, the state can no more delegate to its subdivisions a power to discriminate than it can itself directly establish inequalities. When a parish wants to lock its school doors, the state must turn the key. If the rule were otherwise, the great guarantee of the equal protection clause would be meaningless."

And this court in an opinion concurred in as to this point by every member of the court, including the members of the present panel, in the case of *Bell* v. *School Board of Powhatan Co.* (No. 8944, decided June 29, 1963), — F. 2d —, said of the School Board of that Virginia County:

> "They are not told to exercise powers they do not have; they are merely forbidden to take any steps themselves toward the closing of the schools, and *this injunction is necessary to prevent a violation of the equal protection of the Fourteenth Amendment.*" (Emphasis added)

Whether the local unit is ordered to close its schools or permitted to do so under state law is immaterial, so long

as the state directly or indirectly participates in the operation of a statewide system of schools.

Nor do I think this suit is barred by the Eleventh Amendment to the Constitution of the United States. It is well settled that a suit against a political subdivision of a state, such as a county, is not barred by the Eleventh Amendment. The leading decision in *Lincoln County* v. *Luning*, 133 U. S. 529 (1890), where the point was urged that the county is an integral part of the state and could not, therefore, be sued under the Eleventh Amendment. The Supreme Court said:

> "... It may be observed that the records of this court for the last thirty years are full of suits against counties, and it would seem as though by general consent the jurisdiction of the federal courts in such suits has become established."

In *Kennecott Copper Corporation* v. *State Tax Comm.*, 327 U. S. 573 (1946), the Supreme Court again held that consent was not necessary for suits against counties and municipalities. In short, insofar as the Eleventh Amendment is concerned a suit in equity to compel affirmative action by a county through its Board of Supervisors is maintainable for the simple reason that a county as such is not a "state" within the meaning of the constitutional prohibition. I am aware of those cases cited which invoke the constitutional bar if the subsidiary political unit bears such a relationship to the state in the particular function involved as to constitute it in agent of the state with respect to that function. They do not apply in this case. This Court has recently discussed this distinction in *Duckworth* v. *James*, 267 F. 2d 224 (4 Cir. 1959), *cert. denied* 361 U. S. 835. There it was held that an injunction would lie to restrain the City of Norfolk from withholding funds from the

Norfolk School Board. It is the state scheme itself which provides that part of the essential operating revenue must come from the taxes levied by local boards. The words of this Court in *Duckworth* v. *James, supra,* are pertinent:

> "The present case falls within the class of cases where a public officer or agent makes use of his authority to perform an illegal act by invoking the command of an unconstitutional statute or *seeks to carry out a valid statute in an unconstitutional manner.* (Emphasis added.) In such cases it is held that his action is not the act of the state but the act of an individual which may be restrained by the injunctive power of the federal court."

Neither am I impressed with the argument that the district court has no power to compel a levy of taxes for a monetary appropriation by the defendant Board of Supervisors should it fail to obey the mandate of the district court. It should be enough to cite *Virginia* v. *West Virginia,* 246 U. S. 565 (1918). There the defense was advanced by West Virginia that the judicial power of the United States did not extend to the coercing of a judgment by a decree requiring a tax to be levied. The opinion of the court is plain in its implication that West Virginia could be compelled to pay if compulsion were the only way to accomplish the result. But it is necessary here only to decide whether the subdivision of the state (Prince Edward County) may be required to provide the funds necessary to comply with the judgment. There can be no doubt that the judicial power may enforce the levy of a tax to meet a judgment rendered. *Labette County Commissioners* v. *Moulton,* 112 U.S. 217 (1884). See also *Graham* v. *Folsom,* 200 U.S. 248 (1906). It is to be noted that the

Appendix A

Supreme Court of Appeals of Virginia in *Griffin* v. *Board of Supervisors of Prince Edward County*, 203 Va. 321, 124 S. E. 2d 227 (1962), did not consider whether under federal law the County Board could be compelled to levy taxes and appropriate funds for the operation of the county public school system. The Virginia law does not prohibit the Supervisors from levying the taxes and appropriating the revenue, it merely vests in them the power to decide whether this shall be done. In *City of Galena* v. *Amy*, 72 U.S. (5 Wall.) 705 (1866), a suit was brought in a federal court to recover interest on bonds. The Supreme Court required that discretionary taxing power be exercised in a particular manner. I think that under federal constitutional law an affirmative order is appropriate here notwithstanding the unavailability of mandamus under Virginia law. The County Board has the unquestionable power to levy the taxes; the schools of this County may not remain closed while the state maintains a school system elsewhere.

Finally, the Board of Supervisors of Prince Edward County closed the public schools for the sole purpose of avoiding compliance with the decree of this court. The district court so found. The Board publicly proclaimed its intention and purpose by its resolution dated May 3, 1956:

> "Be It Resolved, That the Board of Supervisors of Prince Edward County . . . do hereby declare it to be the policy and intention of the said Board . . . that no tax levy shall be made . . . nor public revenue derived from local taxes . . . be appropriated for the operation and maintenance of public schools in said county wherein white and colored children are taught together under any arrangement or plan whatsoever."

This was the defiant response to the decision of the Supreme Court in *Brown* v. *Board of Education*, 347 U.S. 483

(1954), applying expressly to the schools of Prince Edward County. The district court found that it was passed in anticipation of our decision in 1959 that desegregation in compliance with *Brown* should commence in the fall of 1959. In the factual context of this case I cannot agree with the majority that this was a permissible compliance with the Supreme Court's order. The law has long been settled that such conduct violates the Fourteenth Amendment and may be enjoined. *Brown* v. *Board of Education*, 347 U.S. 483; *Cooper* v. *Aaron*, 358 U.S. 1; *Aaron* v. *Cooper*, 261 F. 2d 97 (8 Cir. 1958); *James* v. *Duckworth*, 170 F. Supp. 342 (E. D. Va. 1959); *James* v. *Almond*, 170 F. Supp. 331 (E. D. Va. 1959); *Aaron* v. *McKinley*, 173 F. Supp. 944 (E. D. Ark. 1959), *Aff'd sub nom Faubus* v. *Aaron*, 361 U.S. 197; *Bush* v. *Orleans Parish School Board*, 190 F. Supp. 861 (E. D. La. 1960). Equal educational opportunity through access to nonsegregated public schools is secured by the Constitution. The state has an affirmative duty to accord to all persons within its jurisdiction the benefits of that constitutional guarantee. *Taylor* v. *Board of Education*, 294 F. 2d 36 36 (2 Cir. 1961). Indeed Congress regarded so highly the duty of maintaining public schools that when it readmitted at least three Confederate states, Virginia, Mississippi and Texas, it specifically required that their constitutions:

> "... shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of school rights and privileges secured by the constitution of said State." 16 Stat. 62, 67 and 80 (1870).

It is tragic that since 1959 the children of Prince Edward County have gone without formal education. Here is a truly shocking example of the law's delays. In the scales of justice the doctrine of abstention should not weigh heavily against the rights of these children.

APPENDIX B

May 3, 1956 Resolution of Board of Supervisors of Prince Edward County.

At a regular meeting of the Board of Supervisors of Prince Edward County held at the courthouse thereof on the 3rd day of May 1956, at which meeting all members of the board were present, the following resolutions were adopted unanimously:

I

BE IT RESOLVED BY THE BOARD OF SUPERVISORS, That we do hereby express to the people of Prince Edward County our gratitude that they have made known to this board so clearly their views upon the grave problems with which we are confronted with respect to our schools. The support of our people makes the burden of our responsibilities lighter and the course of our future action clearer. We trust the people of the county will continue to make known to us their views as we go forward to meet our problems together.

II

BE IT RESOLVED, That the Board of Supervisors of Prince Edward County as the elected representatives of the people of Prince Edward County, do hereby declare it to be the policy and intention of said board in accordance with the will of the people of said county that no tax levy shall be made upon the said people nor public revenue derived from local taxes shall be appropriated for the operation and maintenance of public schools in said county wherein white and colored children are taught together under any plan or arrangement whatsoever.

III

BE IT RESOLVED BY THE BOARD OF SUPERVISORS OF PRINCE EDWARD COUNTY, That the Governor of Virginia, the superintendent of public instruction, and the State Board of

Education are hereby requested to pay any State revenue to the School Board of Prince Edward County in support of public schools in accordance with the policy adopted by the board of supervisors of said county for the payment of local revenues to said school board.

IV

BE IT FURTHER RESOLVED BY THE BOARD OF SUPERVISORS OF PRINCE EDWARD COUNTY, That the "Affirmation" signed by citizens and school patrons of the county is hereby received and directed to be filed with records of the board and it is further resolved that the "Statement of Convictions and Purposes" adopted by the citizens of this county present at this meeting (being approximately 250 in number) be received by the board and it is directed that the same be filed with the records of the board.

And the clerk of this board is directed to prepare copies of the affirmation with a statement attached thereto showing the number of the citizens whose names are signed thereto together with copies of the "Statement of Convictions and Purposes" and that one copy of each be transmitted to the School Board of Prince Edward County, the Governor of Virginia, the superintendent of public instruction, the attorney general of Virginia, the State Board of Education, Representative J. H. Daniel and Senator J. D. Hagood, together with a copy of this resolution, and of the resolution this day adopted stating the policy and intention of this board with respect to the levy of taxes and appropriation of local revenue for school purposes.

V

BE IT RESOLVED BY THE BOARD OF SUPERVISORS OF PRINCE EDWARD COUNTY, That the Governor be and he is hereby respectfully requested not to call a special session of the

Appendix B

Legislature of Virginia for the purpose of presenting any legislative plan which would require, permit, or authorize under the laws of Virginia the teaching of white and Negro children together in the public schools of Prince Edward County.

APPENDIX C

Explanation of the June 3, 1959 action of The Board of Supervisors in refusing to appropriate money or levy taxes for the operation of a public school system in Prince Edward County for the 1959-60 school term.

The action taken today by the Board of Supervisors of Prince Edward County has been determined upon only after the most careful and deliberate study over the long period of years since the schools of this county were first brought under the force of Federal Court decree. It is with the most profound regret that we have been compelled to take this action. We do not act in defiance of any law or of any court. Above all we do not act with hostility toward the negro people of Prince Edward County.

On the contrary, it is the fervent hope of this Board that the friendly and peaceful relations between the white and negro people of the county will not be further impaired and that we may in due time be able to resume the operation of public schools in this county upon a basis acceptable to all the people of the county.

The School Board of this county is confronted with a court decree which requires the admission of white and colored children to all the schools of the county without regard to race or color. Knowing the people of this county as we do, we know that it is not possible to operate the schools of this county within the terms of that principle and, at the same time maintain an atmosphere conducive to the educational benefit of our people.

We are also deeply concerned that we should not bring about conditions which would most certainly result in further racial tension and which might result in violence of a nature which would be deeply deplored by all of our people and would destroy all hope of restoring the peaceful and happy relations of the races in this county.

Our action is in accord with the will of the people of the county repeatedly expressed during the past five years and

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In the

Supreme Court of the United States

No. 592

COCHEYSE J. GRIFFIN, ETC., ET AL.,
Petitioners,

v.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, ET AL.,
Respondents.

BRIEF AND APPENDIX IN OPPOSITION TO GRANTING WRIT OF CERTIORARI

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In the

Supreme Court of the United States

No. .....

COCHEYSE J. GRIFFIN, ETC., ET AL.,
Petitioners,

v.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, ET AL.,
Respondents.

BRIEF IN OPPOSITION TO GRANTING WRIT OF CERTIORARI

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Respondents desire briefly to set forth some of the reasons why petition for writ of certiorari to review the judgment and decree of the United States Court of Appeals for the Fourth Circuit entered in this cause on August 12, 1963, should not be granted.

OPINIONS BELOW

At the time the petition for writ of certiorari was filed, the opinion of the Court of Appeals had not been reported.

Since that time it has been reported and is found in 322 F. 2d 332.

JURISDICTION

We do not question the fact that this Court has the jurisdiction. We do say, and that without regard to what we hereafter point out in this reply, that the jurisdiction should not be exercised in a case such as this where the Court of Appeals has not passed upon any of the ultimate substantive issues, but has remanded the case to the District Court for a consideration by it of the substantive issues after the controlling questions of state law have been decided by the Supreme Court of Appeals of Virginia. Those controlling questions of state law were submitted to the Circuit Court of the City of Richmond in the case of *School Board of Prince Edward County* v. *Griffin, et al.*, and the opinion of that court was handed down on March 21, 1963. That opinion is not reported. In order that this Court may have full knowledge of the issues of state law involved, we print that opinion as Appendix A to this brief.

Appeal was duly taken to the Supreme Court of Appeals of Virginia which granted the appeal in June of 1963. Because of the importance of the case, the Court advanced it on the docket and set it for argument at the October, 1963, session. The case was argued October 8, 1963. It is the general practice of the Supreme Court of Appeals of Virginia to decide cases argued at one session on the second Monday of the succeeding session. The succeeding session of the Supreme Court of Appeals will convene on November 25, 1963, and its opinion day will be December 2, 1963. On very rare occasions a case is not decided at the succeeding session, but may be carried over to the session thereafter.

Should that happen in this case, the decision of the Supreme Court of Appeals may be expected in January of 1964.

We submit that this Court should not deal with a decree in a case which is in the situation that here exists; namely, where the United States Court of Appeals has decided none of the substantive issues, but has held that decision thereon should await the determination of questions of state law and where those questions of state law have not only been submitted but have been argued before the highest appellate court of the state from which an almost momentary decision is awaited.

QUESTIONS PRESENTED

The petition for writ of certiorari enumerates four questions which petitioners state are presented.

The first question is whether under the circumstances of this case the doctrine of federal abstention should be applied. In their "Reasons for the Allowance of the Writ" petitioners discuss and seek to support their view of this question.

No reason for the allowance of the writ in relation to the second and fourth questions is set forth in the petition.

The third question which the petitioners say is presented is that related to the constitutionality of state tuition grants to parents in aid of the education of their children at private nonsectarian schools or at public schools outside of the locality in which the parents reside. That question is not involved in this case as is very clearly stated by the Court of Appeals in its opinion as follows:

> "As indicated above, Virginia's tuition grants had a considerable history. That program has not been attacked in this case. Its constitutionality has not been questioned." 322 F. 2d 332, at p. 339.

STATEMENT

Beginning on page 3 of the petition and under the title of "Statement," the petitioners give their conception of an accurate factual statement which is supplemented by them in various places in the latter portion of the petition. While there is much in that "Statement" that cannot be sustained from the record, it is not necessary in this brief in opposition to go into any extended correction because our contention can be predicated as well upon the erroneous statements of petitioners as it can be upon an accurate statement. We are impelled, however, to call attention to several things in this "Statement."

In the paragraph beginning at the bottom of page 7 of the petition it is said that the present tuition grant program of Virginia has its genesis in the "massive resistance" legislation of 1956. This is incorrect. Long before the term "massive resistance" was conceived, Virginia had an extensive tuition grant program applicable to many situations.*

It is then said that the "massive resistance" legislation provided "for the channeling of public school funds into private schools," and the inference to be drawn from the remainder of the paragraph is that the present tuition grants are payable out of funds which would otherwise go to the support of public schools. A cursory examination of Virginia's financial legislation proves such an inference to be totally unwarranted. For instance, all appropriations in aid

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* For history of tuition grants to war orphans beginning with Acts of Assembly 1930, p. 810. See *Almond* v. *Day*, 197 Va. 419, 89 S. E. 2d 851 (1955); for tuition grants in other instances see Acts, 1936, p. 561 (§ 23-10, Code of Virginia (1950)); for provision that one school district authorized to pay tuition of pupil attending school in another school district, see § 719, Code of Virginia (1919); for Act under which payment of vocational rehabilitation expenses of disabled persons is authorized, see Acts of Assembly 1922, p. 901.

of public schools made by the General Assembly of Virginia for the biennium beginning July 1, 1960, are found in Items 355 through 389, inclusive, of the Appropriation Act of 1960 (Acts of Assembly 1960, pp. 995, *et seq.*) The appropriation out of which state tuition grants are paid is not found in any of those items. There is an entirely different and separate appropriation to the Governor for the sole purpose of paying these tuition grants which is found in Items 505 and 506 of that Appropriation Act (p. 1021). In like manner in the Appropriation Act of 1962 for the biennium beginning July 1, 1962, all funds in aid of public schools are to be found in Items 392 through 436, inclusive, of the Appropriation Act of 1962 (Acts of Assembly 1962, pp. 1334, *et seq.*). None of those funds is available for the payment of tuition grants. Money for tuition grants is provided in an appropriation to the Governor for that purpose and is Item 548 of that Appropriation Act (p. 1360).

Great complaint is made by petitioners of what they assert to have been delays in this litigation. The only purpose of these statements is to gain an unwarranted sympathy from the Court. It is not charged that any of these defendants has been guilty of any delay. The truth of the matter is that these very petitioners waited from the spring of 1959, when the Court of Appeals handed down its opinion ordering that desegregation of the public schools should commence in September of 1959, until April 22, 1960, before they saw fit to present to the District Court an order carrying out that opinion and mandate of the Court of Appeals. Furthermore, while these petitioners did file a motion for leave to file a supplemental complaint in June of 1960, they aggrieviously misquote the record when they state that the supplemental complaint was amended in September, 1960. They did not even move to amend that supplemental com-

plaint until January of 1961, and it was amended in April of 1961.

In September of 1961, petitioners filed in the Supreme Court of Appeals of Virginia a mandamus suit under the style of *Griffin* v. *Board of Supervisors of Prince Edward County*, 203 Va. 321, 124 S. E. 2d 227 (1962), seeking to compel the Board of Supervisors of the County to levy taxes and appropriate funds for public schools within the County. They submitted in their petition to that Court questions of both state and federal law; and upon the pleadings being presented to the United States District Judge, he found in his order of November 16, 1961, that they had submitted the questions which he in his opinion of August 23, 1961 (*Allen* v. *County School Board*, 198 F. Supp. 497 (E.D. Va. 1961)) had held needed to be decided by the State Supreme Court. That having been done, they then proceeded to file a brief before the Supreme Court of Appeals of Virginia in which they denied that they were submitting any questions of federal law. It was for that reason that the Court of Appeals for the Fourth Circuit in its opinion of August 12, 1963, stated:

> "The plaintiffs applied to The Supreme Court of Appeals of Virginia for a writ of mandamus to compel the Board of Supervisors to levy taxes and appropriate funds for the operation of public schools. The District Judge saw copies of the pleadings and, apparently, was of the opinion they put in issue all relevant questions. In their printed brief, however, the plaintiffs disclaimed the presence of any federal question, with the result that the court decided only one narrow issue. * * *" 322 F. 2d 332, at p. 334, footnote 3.

We do not believe that there has been any unnecessary delay in this case; but, if there has been, it is the petitioners

who brought it about. That statement is borne out by the fact that petitioners do not charge respondents with having brought about any delay, and it is safe to assume that if a vestige of a ground existed upon which to support such a charge, it would have been made.

Finally, we call attention to what is not only a highly improper statement but a totally erroneous one. On page 23 of the petition, it is stated:

> "Thanks to the Government of the United States, formal, standardized education has been provided Negro children in the county since September, 1963, under private auspices."

The truth is the following: As early as January of 1960 the white citizens of Prince Edward County organized a corporation for the purpose of operating private schools for the Negro children in exactly the same way that education was being made available to their own children. Had the Negro citizens desired in 1960 to cooperate with this move to furnish education through private sources to their children, those children would not have been without educational advantages during these years—but, for whatever the reason, such was not to be.

This record further shows that when the Virginia Teachers Association (an association of the Negro public school teachers in Virginia) announced it would conduct a crash educational program for Negro children in the summer of 1961, the School Board of the County immediately offered the public school buildings of the County, together with utilities and janitorial services, for use in that program, all at no expense. That offer was rejected, and as shown by this record, that crash program was carried on with makeshift facilities in county churches and stores.

The only connection that the "Government of the United States" has had with the present private schools being operated in Prince Edward County for Negroes is that an Assistant Attorney General of the United States, i.e., William vanden Heuvel, acted as a catalyst in bringing together various interests and induced the Negro people of the County to avail themselves of private educational facilities. He has paid public tribute in an address recently delivered by him at Hampden-Sydney College to the cooperation and desire of the authorities and white citizens of Prince Edward County to assist in giving to the Negro children educational advantages (Richmond Times-Dispatch, October 18, 1963). Not a member of the Board of Directors of that private school is connected with the Federal Government. They are all Virginians engaged in educational work in Virginia save the Chairman of the Board who is Ex-Governor Colgate W. Darden, former President of the University of Virginia. Those schools are being conducted and operated in buildings owned by the School Board of Prince Edward County which have been made available for use by this private corporation together with school buses and other equipment. The lease provides for a rent which simply meets the expenses to which the School Board of Prince Edward County is put in connection with the buildings being used. That rent does not provide for any return on capital investment and does not include one penny of profit. As a matter of fact, well over a million and a quarter dollars of properties are being rented for an annual consideration slightly in excess of thirty thousand dollars. And, out of that rental the School Board of Prince Edward County and not the trustees of the private school system furnishes all repairs and janitorial services. So far as the attorneys representing the respondents in this case are advised, and the attorneys for the School Board and

the Board of Supervisors have been very close to the situation, there has been not one cent of money contributed to this cause by the Federal Government or any department thereof.

But for the actions of the Governor of Virginia in persuading the individuals who are the Directors of the corporation to give of their time and ability to this cause, but for the willingness of those Virginians so to do, and but for the cooperation given by the School Board of Prince Edward County in making available buildings, equipment and transportation facilities, these schools would have been an impossibility because the trustees operating them did not agree to serve and did not begin any work on the project until late in August of this year, and those schools were begun on September 16 of this year.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

Under the heading "Reasons for the Allowance of the Writ" the petitioners assign one reason. They say:

> "Application of the doctrine of federal abstention in this cause is misplaced and in direct conflict with principles established in the decisions of this Court."

After citing a number of decisions of this Court, they then set forth in the first paragraph beginning on page 13 of their petition their conception of the doctrine of federal abstention. With their statement, so far as it goes, we have no complaint. But their statement of that doctrine is not complete. Federal courts should abstain not only as stated by them "where the strands of local law are so inmeshed in the issues pending before the federal court, and an authoritative interpretation of the local law questions may make

unnecessary consideration of the federal claims presented," but the federal courts also should abstain when an essential part of the question to be decided is the meaning and interpretation of state law. When such is the case, the opportunity should be given to the state court to decide that question of state law so that the federal court may be certain of the facts to which it is applying federal law. The very cases cited by the petitioners in support of their narrow conception of the doctrine of federal abstention support this full and true statement of that doctrine.

On page 14 of their petition, the petitioners set forth four federal claims which they say are raised in this case. They then add:

> "These are all federal issues which must be determined in this cause and which cannot be settled with any finality in the state courts."

The question is not whether the issues can be settled with finality in the state courts. Rather, the question is whether or not authoritative interpretation of state Constitution and statute is needed before the true issue, if any, under the federal law may be stated.

There cannot be the slightest doubt that the case asserted by petitioners fundamentally rests upon the interpretation which petitioners place upon the Constitution and statutes of Virginia. A reading of their amended supplemental complaint filed in April of 1961 is sufficient to demonstrate the accuracy of that statement.

Yet, petitioners contend that the questions truly involved in this case may be decided by the federal court without determining a number of questions of state law—the most fundamental of which is whether the State of Virginia maintains, operates and supervises the public schools in the

state or whether each locality maintains, operates and supervises its own schools. This contention is belied by the petition itself—the above question is so fundamental to this whole case that the petitioners cannot even summarize their reasons why the writ should be granted without setting forth and relying upon their interpretation of the state law. The last full sentence in the main text on page 17 of the petition reads:

> "Here, the state is fully involved in the educational process and in the maintenance, operation, and supervision of public schools now operating throughout the state."

There is a footnote to that sentence in which many sections of the Virginia Code are cited, and the main text of the petition proceeds further to elaborate upon petitioners' view that the maintenance, operation and supervision of public schools in the State of Virginia is fundamentally a state matter. One of the great issues in this case, and indeed the federal aspects of this case cannot be approached or dealt with if that issue is to be ignored, is whether the public schools operated in Virginia are established, maintained and operated by the State of Virginia or by the localities. The Court of Appeals for the Fourth Circuit stated it thus:

> "The question here, however, is whether Virginia's school laws establish an arrangement within the local option principle the defendants advance. If Section 129 of Virginia's Constitution imposes upon the General Assembly the duty to provide operating, free, public schools in every county, as the United States contends, its election to establish a system having features of a local option arrangement may be permissible under state law only so long as schools are operated in every county.

> On the other hand, if Section 129 of Virginia's Constitution, construed in the light of other constitutional provisions, requires of the General Assembly only that it provide for a system of education under which counties and cities are authorized to establish and maintain schools of their own with state assistance, then the principle which the defendants assert may be applicable. The answer is unclear. It requires interpretation and harmonization of Virginia's Constitution and statutes.
>
> "The question is unresolved. Virginia's Supreme Court of Appeals has considered her school laws in a number of cases, but none of them settle the question here." *322* F. 2d, *332*, at p. *342*.

The whole case of petitioners is predicated upon an assertion of state operation, first made in their amended supplemental complaint and from then on at every stage in this proceeding. A fundamental position of the respondents from the inception has been that under the Constitution and laws of Virginia, as they now stand and for many years have stood, the establishment, maintenance and operation of the public schools is a local matter. No opinion deciding with finality the issues presented can be rendered without there first being a determination of the primary question which is not only "immeshed in" but irrevocably woven as a part of this case and that question is one of state law on which only a state court can speak with finality:

> "Are the public schools of Virginia established, maintained and operated by the State or by the several localities?"

Any attempt to determine the federal issues without first deciding that question must ultimately prove to be an exercise in futility.

We do not question petitioners' statement that this is a

case of great public importance. We at the present time are inclined to the view that ultimately the decision on substantive questions in this case should be reviewed by the Supreme Court of the United States. But that review ought to come at the proper time and under the proper conditions. It should come only after the lower federal tribunals, both District Court and Court of Appeals, have intelligently dealt with the substantive issues in the light of an authoritative decision of the meaning of state Constitution and statutes. Questions as important as those here raised should not be dealt with by this Court until they have first been decided by the courts below. Then, and only then, will this Court be placed in true appellate position where it can review the actions of the courts below rather than in the position of deciding the matter in the first instance.

CONCLUSION

Rule 19 of the Revised Rules of the Supreme Court of the United States on its face neither controls the Court nor measures the Court's discretion upon the question whether it will grant a writ of certiorari. But, the attention of the Court should be called to the fact that none of the character of reasons which the Court sets forth in that Rule as indicative of those that will be considered is here present. Here the Court of Appeals for the Fourth Circuit has not rendered a decision in conflict with the decision of another court of appeals on the same matter; certainly it has decided no question of state law in a way in conflict with the state law or otherwise; it has decided no important question of federal law which has not been settled by this Court; it has decided no question of federal law in a way which conflicts with any applicable decision of this Court; and it has not departed from the accepted or usual course of judicial proceedings.

As said above, when the substantive questions have been decided by lower tribunals in the light of state Constitution and statute, then it may well be that the matters are of such importance that this Court should review. But until that time has arrived, this Court should deny the petition for the writ.

Respectfully submitted.

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APPENDIX A

Opinion of the Circuit Court of the City of Richmond, Virginia

(March 21, 1963)

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RE: *County School Board of Prince Edward County, Virginia, et al.* v. *Leslie Francis Griffin, Sr., et al.*

Gentlemen:

This proceeding is before the Court upon the plaintiff's Amended Complaint for Declaratory Judgment, said Amendment having been permitted by order of the court; upon the Answer of the defendants, State Board of Education and Superintendent of Public Instruction, to the Amended Complaint; upon the Answer of the guardian *ad litem* for the infant defendants, Leslie Francis Griffin, Jr., Betty Jean

Carter and Jacquelyn Reid, to the original Complaint, said guardian *ad litem* having stated at bar that no copy of the order amending the said Complaint was delivered to him prior to the hearing on the merits; upon the evidence adduced on December 13 and 14, 1962, and upon the briefs and argument of counsel for the parties and of *amicus curiae*. The defendants, Leslie Francis Griffin, Sr., James L. Carter and Warren A. Reid, though duly served with process and with a copy of the decree of September 13, 1962, amending the original Complaint, failed to appear, plead, answer or demur.

It appears to the Court that basically four major issues are presented for determination. First, under the facts and circumstances of this case what are the powers and the duties of the plaintiffs, the County School Board of Prince Edward County and T. J. McIlwaine, Division Superintendent of Schools of Prince Edward County, with respect to the establishment, operation and maintenance of public free schools in Prince Edward County? Second, under the facts and circumstances of this case what are the powers and duties of the defendants, State Board of Education and Woodrow W. Wilkerson, Superintendent of Public Instruction, with respect to the establishment, operation and maintenance of public free schools in Prince Edward County? Third, under the facts and circumstances of this case what are the rights of the parents of children who reside in Prince Edward County under the laws applicable to State Scholarship Grants? Fourth, under the facts and circumstances of this case has any right secured to any resident of Prince Edward County by the Constitution of the United States been violated?

Since each issue must be resolved in the light of this particular set of facts and circumstances, it is incumbent upon

the Court first to adjudicate the facts determinable from the pleadings and from the evidence adduced. The Court finds the following facts:

1. That in the spring of 1959 the plaintiff Division Superintendent of Schools, with the advice of the plaintiff School Board, prepared and submitted to the County Board of Supervisors of Prince Edward County the two estimates prescribed by § 22-120.3 of the Code of Virginia, 1950, as amended. The first estimate showed the amount of money deemed to be needed for the support of the public schools of the County during the next scholastic year, and the second showed, in the alternative, the amount of money deemed to be needed for educational purposes for the County during that period, the school year 1959-60. Upon presentation of the two estimates, the Division Superintendent appeared in person before the County Board of Supervisors and requested that the sums called for be made available to the School Board by levy and appropriation.

2. That on June 2, 1959, the County Board of Supervisors refused to levy any taxes for the year 1959-1960 for either operation of public schools or for educational purposes and the next day, June 3, 1959, the said Board of Supervisors refused to approve either the "Budget" submitted by the Superintendent of Schools for "the operation of public schools" or the "Alternative Budget Estimate for educational purposes." No levy and no appropriation for either purpose was made with the exception of an appropriation of $30,400.00 for "Public Schools—Debt Service." As a result of lack of funds no public free schools were operated by the County School Board during the scholastic year, 1959-60.

3. That for the scholastic year 1959-60 no State Scholarship Grant applications were processed by the State Board of Education for Prince Edward County residents and no monies appropriated by the General Assembly of Virginia for the purpose of such grants were paid out by or through the defendant State Board of Education to such residents.

4. That the so-called "Constitutional Minimum" funds, consisting of Prince Edward County's proportionate share of the funds derived from the sources enumerated in Section 135 of the Constitution of Virginia, during the year 1959-60 were earmarked for teachers' salaries by the basic appropriation made by the General Assembly (Item 139, Chapter 96, Acts of Assembly, Extra Session, 1959). No public free schools being in operation in the County during the year and no teachers being employed by the County School Board, the result was that the County's share of these funds reverted to the General Fund of the Commonwealth. The so-called "Forest Reserve" funds which were apportioned to Prince Edward were not appropriated for the use of the County School Board by the County Board of Supervisors and were not available for expenditure by the School Board.

5. That on or about March 31, 1960, the plaintiff Division Superintendent of Schools transmitted to the Clerk of the County Board of Supervisors for submission to that body the two approved estimates provided for by § 22-120.3 of the Code, calling the particular attention of the said Board of Supervisors to the necessity for funds to defray the cost of a school census, as well as the fact that the policies of fire insurance on the school buildings would expire during the scholastic year. These estimates were referred to the Budget Committee of the Board of Supervisors

on April 5, 1960, and on April 27, 1960, the said Board again refused to approve the "Budget" for the operation of public schools and the "Alternative Budget Estimate for educational purposes" for the year 1960-61.

6. Although requested by Mr. Fitzpatrick, attorney for the County School Board, to lay a County levy and to appropriate the funds sought by the School Board, the County Board of Supervisors failed so to do, but rather set a public hearing to be held on June 7, 1960, to consider their actions set out above upon the two estimates submitted by the Division Superintendent on behalf of the School Board. At the same meeting of the Board of Supervisors, on April 27, 1960, that body provided for an increase in the general county levy and certain other levies, a part of which was to be expended for "educational purposes" as may be provided "by Ordinances adopted by the Board of Supervisors." This matter was to be heard at the same public hearing on June 7, 1960, and notice thereof was published.

On July 5, 1960, the Board of Supervisors met and appropriated the sum of $30,000.00 from local sources for public school debt service and the sum of $315,000.00 for "Educational purposes in furtherance of the elementary and secondary education of children residing in Prince Edward County in private nonsectarian schools to be expended as may be provided by Ordinances and pursuant to Section 141 of the Constitution of Virginia."

7. That two ordinances were adopted on July 18, 1960, by the Board of Supervisors to be effective on August 6, 1960. The first such ordinance authorized parents of and others *in loco parentis* to resident children between the ages of six and twenty to apply for and receive, subject to certain terms and conditions, grants to be used in furtherance

of elementary and secondary education of such children in private non-sectarian schools located within the County of Prince Edward and in public schools located in Virginia. The second ordinance provided that contributions to a non-profit, non-sectarian private school located in the County of Prince Edward could, under certain terms and conditions and within certain limitations, be deducted from real and personal property taxes assessed by the County upon the contributor. Neither of these ordinances mentioned or provided for the disbursement of any funds to the County School Board.

8. That for and during the school year 1960-61 1,332 applications for scholarship grants submitted by residents of Prince Edward County were processed and approved by and through the State Board of Education, of which 834 were for children who attended an elementary school and 468 for children who attended a high school. Some few of these children, less than a dozen, attended schools outside of the County, the remainder attended private non-profit, non-sectarian schools within the county.

During the same period some 1,363 scholarship grants were paid to parents of or others *in loco parentis* to resident children from funds appropriated by the County Board of Supervisors and paid out pursuant to ordinance adopted July 18, 1960.

9. That during the school year 1960-61 the County School Board received as its proportionate share of "Constitutional Minimum" funds, pursuant to Items 365 and 366, Chapter 610, Acts of Assembly, 1960, as required by Section 135 of the Constitution of Virginia, the sum of $39,360.00. To this amount was added the sum of $2,644.40 paid to the County Treasurer for expenditure by the School

Board for public school purposes pursuant to § 22-119, as amended, of the Code and representing the County's share of "forest reserve" funds. Thus, the total income of the County School Board from all sources was $42,004.40 for the school year.

From these receipts the School Board paid out its unpaid obligations from the previous year and paid a total of $7,697.47 in premiums for fire insurance on the buildings it maintained as well as other maintenance expenditures for school buildings of $8,817.70. Of this latter amount $2,243.82 was chargeable to the Farmville High School Building and $301.00 was chargeable to the R. R. Moton High School. The Division Superintendent estimated that at least 50% of the total paid out for fire insurance premiums was attributable to these two school buildings. Simple mathematics show that during the school year in question the County School Board expended approximately $3,749.15 of funds derived under Section 135 of the Constitution on the two high school buildings. As a result of the foregoing expenditures and others set out in Plaintiffs' Exhibit No. 17 the School Board ended the year with a balance of $252.08. Due to the lack of funds for the purpose, the County School Board was unable to operate any public free schools during the year 1960-1961.

10. That on or about March 31, 1961, the Division Superintendent of Prince Edward County Public Schools again submitted to the County Board of Supervisors the alternative estimates of the amounts required for the operation of the public schools and for educational purposes for the school year 1961-62 which had been prepared with the advice of the School Board. He pointed out to the Board of Supervisors that as a practical matter it was probable that if the public schools were operated in the County during the

forthcoming school year, there would be in actual attendance not more than 1800 children. To cover this situation a third estimate was submitted showing the amount deemed needed if not over 1800 pupils attended the public schools. The letter of transmittal contained a request that a levy be fixed or appropriation made by the Board of Supervisors which would provide the sums deemed needed for the operation of public schools or for educational purposes.

11. That on May 24, 1961, the Budget Committee of the County Board of Supervisors presented to said Board its report that various estimates had been received, including those from the Division Superintendent of Schools, and tendered its estimate of required revenue and expenditures for the fiscal year next ensuing. The Board set a public hearing on the proposals for June 9, 1961, and ordered publication of a synopsis of the proposed budget. At the public hearing seven citizens expressed approval of the budget as advertised, five citizens expressed disapproval for the reason that there was no provision for any expenditures for the operation of public schools. Following the hearing the Board of Supervisors appropriated the sums of $30,000.00 for "School Operation—Local Sources" and $285,000.00 for "Educational purposes" to be expended as provided by ordinance and pursuant to Section 141 of the Constitution of Virginia.

12. That for and during the school year 1961-62 the Prince Edward County School Board received as its proportionate share of "Constitutional Minimum" funds appropriated by Chapter 610, Acts of Assembly, 1960, the amount of $39,360.00 and §22-119 "forest reserve" funds in the amount of $2,181.27, a total income of $41,541.27. Of this income, plus a balance on hand of $252.08, $341.82 was chargeable as maintenance expenditures to the Farmville

High School building and $573.44 to the R. R. Moton High School building. Of a total of $7,691.26 expended for insurance premiums on all School Board buildings, approximately 50%, or $3,845.63, was attributable to the two former high school buildings. In addition, $10,000.00 was paid out on account of a "Literary Fund" loan for the construction of R. R. Moton High School, plus $83.33 in interest on the said loan.

Adding the amounts definitely expended for the two high school buildings yields a total of $14,844.22, or $12,662.95 more than the $2,181.27 received for the use of the County School Board from "forest reserve" funds. On the basis of the evidence presented the Court is unable to determine the exact total amounts expended for the maintenance of these two buildings for either the 1960-61 or 1961-62 school years, since such calculation may require the proration of several expenditures for overhead upon which there is no evidence other than that the expenditures were made.

13. That on or about March 30, 1962, the Division Superintendent transmitted to the County Board of Supervisors the alternative estimates for the school year, 1962-63, as prescribed by § 22-120.3 of the Code, which estimates had been prepared with the advice of the County School Board. Once again, an additional estimate showing the amount deemed needed for the support of public schools was submitted. This latter estimate was predicated upon the assumption that, should the public schools be operated, only some 1600 children would be in attendance rather than all children of school age. In his letter of transmittal the Division Superintendent requested that the Board of Supervisors fix such levy or make such appropriation as would provide the amount deemed necessary for the operation of public schools.

14. That on May 23, 1962, the Budget Committee of the County Board of Supervisors reported that it had received various estimates of amounts deemed to be needed for the fiscal year 1962-1963, including the estimates of the Division Superintendent of Schools. The Committee submitted its consolidated estimate of required revenue and expenditures and the Board of Supervisors then set a public hearing thereon for June 15, 1962, and ordered due publication of a synopsis.

On June 15, 1962, at the public hearing nine citizens expressed approval of the "budget" and eighteen citizens expressed opposition thereto on the ground that no provision was made for expenditures for the operation of public schools. After the public hearing the Board of Supervisors adopted a resolution appropriating the sums of $30,000.00 for "School Debt Retirement" and $360,000.00 for "Educational Purposes" as provided by ordinance and pursuant to Section 141 of the Constitution of Virginia. No amounts were appropriated for the support and operation of the public schools.

15. That up to December 13, 1962, the date of hearing of this proceeding, the County School Board had received, or there had been paid in to its credit, payments on account of its proportional share of the "Constitutional Minimum" appropriated by the General Assembly (Items 396 and 397, Chapter 640, Acts of Assembly, 1962) which were expected to total for the school year the amount of $39,260. The County School Board's share of "forest reserve" funds was also received, but the amount was not stated. Insufficient funds being on hand, the said School Board had not operated any public schools up to the date of hearing on December 13, 1962.

16. That during the school years beginning in 1959-60, and continuing through 1960-61, 1961-62 and 1962-63 to date, while no public free schools have been operated in Prince Edward County, a private corporation, Prince Edward School Foundation, has operated private non-sectarian schools in the County. Further, public free schools have been operated by other School Boards in the Commonwealth.

Turning now to certain mixed questions of fact and law raised by the pleadings, it appears that in Paragraph number 6 of the Amended Complaint plaintiffs allege that certain of the defendants, namely, Leslie Francis Griffin, Sr., *sui juris*, and Leslie Francis Griffin, Jr., infant; James L. Carter, *sui juris*, and Betty Jean Carter, infant, and Warren A. Reid, *sui juris*, and Jacquelyn Reid, infant, have asserted and continue to assert, *inter alia*, that the plaintiffs and the other defendants, State Board of Education and Superintendent of Public Instruction, have "acquiesced" in the refusal of the County Board of Supervisors of Prince Edward County to levy taxes and appropriate money for the maintenance and operation of public schools in the County. This acquiescence is denied by the plaintiffs and by the last named defendants. The fact of assertion and the denial of acquiescence of these parties is taken for confessed as to the *sui juris* defendants, Leslie Francis Griffin, Sr., James L. Carter and Warren A. Reid, by their failure to appear and controvert. The evidence adduced, in particular Plaintiffs' Exhibit No. 22, reveals that the infant defendants have made such an assertion or have had the same made in their behalf and, until final disposition of that matter, continue to assert the same.

This issue of fact must be resolved in favor of the plaintiffs, the State Board of Education and the Superintendent

of Public Instruction. Each year Dr. McIlwaine and the County School Board duly performed all of the duties incumbent upon them under the law in preparing and submitting estimates and requests to the County Board of Supervisors, in maintaining the physical properties for which they were responsible to the people of the County, and in being ready, willing and able to operate public schools in the County had the requisite funds been made available by the Board of Supervisors. Beyond this they had no duty with respect to the situation. Acquiescence implies active assent. Such was not the case with these individuals.

Nor does the evidence support an allegation of acquiescence by either the State Board of Education or the Superintendent of Public Instruction. If any duty to object to the failure of the Prince Edward Board of Supervisors to appropriate any money for the operation of public schools required such action on the part of these two defendants, there is no showing of any knowledge of such duty thereof on their part. The evidence reveals a flat, uncontradicted denial that either the State Board of Education or the Superintendent of Public Instruction "acquiesced" in the Board of Supervisors' failure to act. By Section 22-21 of the Code the State Board is required to stimulate and encourage local supervisory activities and interest in the improvement of elementary and secondary schools. Where no schools are operated there is no local supervision to encourage.

Paragraph 8 of the Complaint as amended alleges that the State Board of Education and the Superintendent of Public Instruction assert that the County School Board has no right to use any portion of the "constitutional minimum" funds, enumerated in Section 135 of the Constitution of Virginia and appropriated and to be appropriated by the General Assembly to the credit of the said School Board,

for the repair and upkeep of any school building except such buildings as are and have been used for the primary and grammar grades. The plaintiffs allege that such funds may be used by the School Board for the repair and upkeep of any school building.

Section 135 of the Constitution specifies that the General Assembly shall apply the amounts derived from the three sources enumerated "to the schools of the primary and grammar grades, for the equal benefit of all the people of the State, to be apportioned on a basis of school population; the number of children between the ages of seven and twenty years in each school district to be the basis of such apportionment." The primary and grammar grades are those grades below the secondary or high school level. In England, the term "grammar school" designates a school in which such instruction is given as will prepare a student to enter a college or university, but in modern American usage the term denotes a school, intermediate between the primary school and the high school, in which English grammar and other studies of that grade are taught. Black's Law Dictionary, 3rd Ed., p. 854.

However, the question of the intent of the framers of the Constitution of Virginia is laid to rest in Volume I, Debates of the Constitutional Convention, 1901-1902, beginning on page 1204, wherein Mr. Richard McIlwaine, the member representing Prince Edward County, explains as follows:

> "While I am on my feet I will say that a gentleman has asked me why we put in the first part of this section 'for the benefit of the primary and grammar grades?' What was the reason of our saying anything about the grammar grade? Those are two distinctive terms, the

primary alluding to that degree of knowledge which is acquired in reading and writing and a little ciphering, and then the grammar grade, which does not include any language other than the English, but takes in a careful study of grammar and of geography and of history and of such studies as increase the general intelligence of the student. In all the Constitution so far as I can recollect that distinction is made. It is all below what is called the high school. The primary and grammar grades embrace what is below the high schools."

The evidence before the Court shows that generally secondary or high school education is given to the grades numbered 8 through 12. Below the eighth grade, education is classified as elementary, including first, primary, and then, grammar grades. The building designated as "Farmville High School" was constructed in two stages, the initial construction being completed circa 1928, and the remainder of the present building in 1936. According to the Division Superintendent, the building was intended to and did for a number of years house both elementary and high school grades. For the last ten or eleven years, that is since 1942 or 1943, this structure has been used exclusively for a high school. The "R. R. Moton High School" building was completed in 1953, having been built for occupancy and use by the high school grades and has been used solely as a high school.

Since 1959 both high school buildings have been vacant and, as set out above in findings of fact numbers 9 and 12, the County School Board has expended for maintenance of these buildings and repayment of a loan on the R. R. Moton building at least $16,412.10 of funds received pursuant to

the provisions of Section 135 of the Constitution of Virginia. Plaintiffs have caused a census to be taken to determine what the school population situation would be should public schools be operated again in Prince Edward County. The results of this census, completed in 1961, are set out in Plaintiff's Exhibit No. 21. In interpreting these results and projecting the same to the date of hearing, the Division Superintendent and the County School Board reached the conclusion that, in the event of a reopening of the public schools, the R. R. Moton High School Building would "probably" be used for both elementary and high school grades and that there was a "possibility" that the Farmville High School building might be used as an elementary school.

The Court is of the opinion that the expenditure by the County School Board for the care and maintenance of the Farmville High School and R. R. Moton High School buildings of any of the "constitutional minimum" funds derived from the sources enumerated in Section 135 of the Constitution has been and is violative of the provisions of that Section and of the successive Appropriation Acts enacted pursuant thereto. Both common sense and the plain language of the Constitution dictate this result. Probabilities and possibilities do not change the actual status of school buildings and equipment when balanced against the logical inference that if the public schools had been operated continuously by the County School Board, there would have been no change in the use of these two structures.

Paragraph number 4(a) of the Amended Complaint sets forth that the six defendants first named as such in the said pleading have asserted and continue to assert that, under the circumstances existing in Prince Edward County, it is the duty and responsibility of the County School Board and of the Division Superintendent, in conjunction with the State

Board of Education and the Superintendent of Public Instruction, under the Virginia Constitution and statutes and under the United States Constitution to establish, maintain and operate a system of public free schools throughout the Commonwealth, including Prince Edward County. This the plaintiffs and the State Board of Education and the Superintendent of Public Instruction deny. For the pertinent reasons hereinabove stated with reference to Paragraph number 6 of the Amended Complaint, the Court finds that the issue exists and should be resolved. As indicated in the Court's statement of the issues involved in this case, the question will be approached first by a determination of the powers and duties of the County officials, under these facts and circumstances, as prescribed by the Constitution and statutes of Virginia.

Article IX of the Constitution of Virginia, entitled "Education and Public Instruction," begins with Section 129, which reads:

> "The General Assembly shall establish and maintain an efficient system of public free schools throughout the State."

This Section apparently had its origin in Section 3 of Article VIII of the Constitution of 1869. The Constitutional Convention which drafted that Constitution assembled in Richmond December 3, 1867, and Section 3 was contained in the report of the Education Committee to the Convention. Prior to that time the only reference to schools in Constitutions successive to the Constitution of 1776 had been to the effect that one equal moiety of a capitation tax levied should be "applied to the purposes of education in primary and free schools." Constitution of 1851, Section 24. By statute, all powers and duties with respect to the establishment, opera-

tion and maintenance of "primary" and "free" schools had been vested in and imposed upon boards of school commissioners in counties, cities and towns, the county courts (for revenue) in counties and the councils of cities and towns. See Chapters LXXXI and LXXXII, Code of 1860. By Chapter LXXIX of that Code the Literary Fund was defined and provision made for the application of a portion of the capitation tax to the purposes of education in primary and free schools. See also *Board of Supervisors* v. *County School Board*, 182 Va. 266, 268-269, for additional historical facts.

In order to determine the powers and duties of the County School Board and of the Division Superintendent the mandate to the General Assembly spelled out in Section 129 of the present Constitution deserves consideration. The Supreme Court of Appeals stated unequivocally in *School Board* v. *Shockley*, 160 Va. 405, 412, that Section 129 imposes a mandatory duty on the General Assembly to establish and maintain an efficient system of free schools throughout the State. Then, in *Scott County School Board* v. *Board of Supervisors*, 169 Va. 213, 215, that Court reiterated the above statement and added that the General Assembly had complied with that requirement by the enactment of a School Code, Acts of Assembly, 1928, Ch. 471, as amended; and again by Acts of Assembly, 1936, Ch. 314. This School Code is today contained in Title 22, Code of Virginia, 1950, as amended.

A "system" is defined by Webster as a formal scheme or method, arrangement, etc., of objects or material, or a mode of procedure; a definite or set plan of ordering, operating, or proceeding. Websters, New International Dictionary, 2nd Ed., p. 2562. This system of free schools throughout the State has been established and is being maintained. Not

only are the various procedures and general plan of operation set out in the Code enacted by the General Assembly, but by successive Appropriation Acts that body has made available each year, within the limitations fixed by the Constitution, the funds necessary to enable the system to function in accordance with the applicable constitutional and statutory provisions. Whether the system is efficient is left to the General Assembly and where it enacts legislation which runs counter to constitutional requirements, the courts will strike down such legislation.

The powers and duties of the County School Board with respect to public schools in the County are clearly enumerated in the law of the Commonwealth. Section 133 of the Constitution specifies that:

> "the supervision of the schools in each county or city shall be vested in a school board, to be composed of trustees to be selected in the manner for the term and to the number provided by law."

This constitutional provision is recognized by the General Assembly in § 22-2 of the Code providing for administration of the State System.

The School Board is then empowered to maintain the public schools for at least nine months or 180 teaching days in each school year, but this term may be reduced, in which event the participating or matching funds provided by the State are reduced proportionately. (Section 22-5 of the Code). Each such Board constitutes a body corporate, with power to contract and to sue or be sued (§ 22-63 of the Code.) It is empowered to enforce the school laws, to make regulations for the conduct of its schools and discipline of the students; to provide for payment of teachers' salaries;

to provide for the erecting, furnishing, and equipping of necessary school buildings and maintenance thereof; to provide such text books for indigent children as may be necessary; to incur costs and expenses; to provide for the consolidation of schools whenever such procedure will contribute to the efficiency of the school system; and to perform such other duties as may be prescribed by the State Board of Education or prescribed by law (§22-72 of the Code); and to provide for the free transportation of pupils (§22-72.1).

Title to all property in the County applicable to public school purposes is vested in the County School Board (§22-147, Code) and the Board may acquire property by gift, devise or bequest (§22-148), as well as by eminent domain (§22-149). The Board has the power to sell or exchange and convey school property (§22-161 of the Code) and is empowered to permit its use for other lawful purposes (§22-164).

The determination of the number and location of public schools which the public welfare may require is left to the sole judgment of local school boards by Section 136 of the Constitution, *School Board* v. *Shockley*, 160 Va. 405, 414. As for public high schools, only local school boards have the power to establish and maintain such schools, provided the establishment of such schools or teaching of high school branches does not interfere with the regular and efficient instruction in the elementary branches (§22-189 of the Code).

Aside from land, buildings, and equipment three other elements are necessary for the establishment and operation of schools: administrative personnel, teachers and pupils. Section 133 of the Constitution requires that the school board of each school division appoint a Division Superin-

tendent of Schools. This administrative and supervisory officer is selected from a list of eligibles certified by the State Board of Education (§22-32 of the Code); has powers and duties, the fixing of the majority of which has been delegated by the General Assembly to the State Board of Education (§22-36); is required to keep records of receipts and disbursements of school funds (§22-36.1); has the duty of inspection of the accounts of and direction of the discharge of duties by the Clerk of the School Board (§22-53); to attend all meetings of the School Board (§22-49); to see that teachers discharge their duties and report neglect or violation thereof to the School Board (§22-203 of the Code and Regulations of the State Board of Education, 1959, §9); and, in general, act as a connecting link between the State Board of Education and the local School Board, primarily in order that the State authorities may be assured that the State funds appropriated for the use of the local school authorities are properly accounted for and to carry out further the requirement of Section 130 of the Constitution which vests general supervision of the school system in the State Board of Education.

The County School Board employs teachers, certified as competent by the State Board of Education, and places them in appropriate schools (§22-203 of the Code). The School Board is required to enter into a contract of employment with each full-time teacher (§22-207), and has the power and duty to dismiss them (§22-203). Once a teacher has been placed in a school, the Division Superintendent has the power of reassignment (§22-205).

With respect to pupils, for many years the statutes of Virginia had conferred upon the local school boards control of the admission of persons eligible to attend the local public schools. Then in 1956 the General Assembly enacted

the "Pupil Placement Act" (Acts of Assembly, 1956, Ex. Sess., Ch. 70), now codified as §§ 22-232.1 to 22-232.8 and §§ 22-232.10 to 22-232.16 of the Code of Virginia, 1950, as amended. Under this legislation the local school boards were divested of all authority to determine the school to which any child should be admitted and all power of enrollment or placement of pupils in the public schools was vested in a "Pupil Placement Board." The Supreme Court of Appeals, in considering the contention that Section 133 of the Constitution vested the power of enrollment or placement of pupils in public schools exclusively in local school boards, held that if the General Assembly "deems it advisable to vest the power of enrollment or placement of pupils in an authority other than the local school boards, it may do so without depriving such local school boards of any express or implied constitutional power of supervision." *DeFebio* v. *County School Board*, 199 Va. 511, 513.

In 1959, however, the General Assembly returned to the local school boards a large measure of the responsibility they had borne formerly. By Chapter 71, Acts of Assembly, 1959, Extra Session, it was prescribed that should a county, city or town, if such town be a separate school district, elect by ordinance adopted by its local governing body upon recommendation of the local school board to be bound by the provisions of the new statute, now codified as Sections 22-232.18 to 22-232.31 of the Code, then the provisions of the Pupil Placement Act would be inapplicable in such county, city or town. Under the 1959 statute the placement of pupils would again be accomplished by local school boards, subject to rules and regulations promulgated by the State Board of Education. The local boards were authorized to fix attendance areas and to adopt such additional rules and regulations relating to placement "as may be in the best interest of their

respective school districts and the pupils therein." (§22-232.19 of the Code). The State Board of Education was constituted a "Board of Appeals," with the right of judicial review of its decisions reserved to the parent or other person having custody of the pupil in question or to "five interested heads of families" should either feel aggrieved by any final order of the Board. (§§22-232.22 to 22-232.26 and §22-232.38 of the Code). Whether the County School Board of Prince Edward County has made the requisite recommendation to the County Board of Supervisors or whether an ordinance has been adopted by the County Board of Supervisors is not revealed by the evidence in this proceeding. Local school boards retain the power to discipline pupils through their principals and teachers (§§22-230 and 22-231.1) and the duty to suspend or expel pupils when the welfare and efficiency of the schools make it necessary (§22-231). Further, should a school board by resolution so recommend to the local governing body and should an ordinance to that effect be adopted by the governing body, then the State compulsory attendance laws shall be in force within the particular county, city or town (§22-275.24 of the Code).

In order to exercise the powers and perform the duties incumbent upon them, local school boards must have available the funds necessary to defray the costs of construction, operation and maintenance of the public schools they deem necessary in the public welfare. The Constitution of Virginia provides that there shall be two principal sources of these funds, the General Assembly and the local governing bodies.

Section 186 of the Constitution directs that:

> "All taxes, licenses and other revenues of the State shall be collected by its proper officers and paid into the State

> Treasury. No money shall be paid out of the State treasury except in pursuance of appropriations made by law; * * *."

With reference to funds for school purposes, Section 135 makes mandatory appropriation by the General Assembly of the "Constitutional minimum" to be apportioned and applied to the schools of the primary and grammar grades. In addition, Section 135 reads:

> "And the General Assembly shall make such other appropriations for school purposes as it may deem best, to be apportioned on a basis to be provided by law."

By this sentence the General Assembly is vested with discretion to determine the amounts and the basis of apportionment of the balance of the money deemed required for school purposes.

In limitation of Section 135 the Constitution prescribes in Section 141 that:

> "No appropriation of public funds shall be made to any school or institution of learning not owned or exclusively controlled by the State or some political subdivision, thereof; provided, first, that the General Assembly may, and the governing bodies of the several counties, cities and towns may, subject to such limitations as may be imposed by the General Assembly, appropriate funds for educational purposes which may be expended in furtherance of elementary, secondary, collegiate or graduate education of Virginia students in public and non-sectarian private schools and institutions of learning, in addition to those owned or exclusively

> controlled by the State or any such county, city or town; * * *; third, that counties, cities, towns and districts may make appropriations to non-sectarian schools of manual, industrial or technical training and also to any school or institution of learning owned or exclusively controlled by such county, city, town or school district."

The second source of school funds is established by Section 136 of the Constitution. That source is local taxation. The Section provides:

> "Each county, city or town, if the same be a separate school district, and school district is authorized to raise additional sums by a tax on property, subject to local taxation, not to exceed in the aggregate in any one year a rate of levy to be fixed by law, to be apportioned and expended by the local school authorities of said counties, cities, towns and districts in establishing and maintaining such schools as in their judgment the public welfare may require; provided that such primary schools as may be established in any school year shall be maintained at least four months of that school year, before any part of the fund assessed and collected may be devoted to the establishment of schools of higher grade. The boards of supervisors of the several counties, and the councils of the several cities and towns, if the same be separate school districts, shall provide for the levy and collection of such local school taxes."

A third source of funds for local school boards, which source is limited for all practical purposes in amount and of which there is no evidence in this case, is revenue or income from glebe lands and church property which may

be appropriated after a referendum of county voters as prescribed in § 57-3 of the Code (§ 22-118).

A fourth source is money derived from the United States under the "Forest Reserve Act" (§ 22-119) and the "Flood Control Act" (§ 22-119.1). There is no evidence that Prince Edward County is entitled to receive any funds under the latter Act. Finally, local school boards may receive donations (§§ 22-116 and 22-145 of the Code).

The local school boards are empowered to borrow money, but the power to borrow is limited. The controlling constitutional provision is Section 115a which prohibits the contraction of any debt by or on behalf of any school board of any county except in pursuance of authority conferred by the General Assembly by general law. The General Assembly is prohibited from authorizing any school board of any county to contract any debt except (1) to meet casual deficits in the revenue, (2) a debt created in anticipation of the collection of the revenue of the said county or board for the then current year, or (3) to redeem a previous liability, unless in the general law authorizing the contraction of debts provision is made for submission of the question to the qualified voters of the county, etc., for approval, which approval by a majority vote is a prerequisite. See § 15-666.29 of the Code. Under this Section the General Assembly may now authorize, by general law, the school board of any county to contract to borrow from the Virginia Supplemental Retirement System for the purpose of school construction, but only with the approval of the governing body of the county. This authorization has been conferred upon county school boards by the General Assembly in Chapter 19.2 of Title 15 of the Code (§§ 15-666.69 to 15-666.76). *Harrison* v. *Day*, 201 Va. 386, 397.

There is one other source of funds for the construction

of schools which is available without the necessity of a referendum. The principal of the Literary Fund above the basic $10,000,000 minimum may be utilized by the General Assembly for public school purposes. Constitution, Section 134. The General Assembly has acted under this provision and, in Chapter 7 of Title 22 of the Code, has empowered the State Board of Education, which invests and manages the Fund (§§22-101, 22-102, 22-104 and 22-106), to lend money belonging to the Fund and in hand for investment to local school boards (§22-105) and has authorized such school boards to borrow such money (§22-107) for the purpose of erecting, altering or enlarging schoolhouses in the respective counties, cities and towns. The onus of repayment of a Literary Fund construction loan falls upon the local governing body, which is required by §22-113 of the Code to include in its general county levies a sum sufficient to meet its liabilities on the loan contract under pain of removal for cause for failing to provide for payment of the loan or the interest thereon, when and as due (§22-113).

In the field of establishment of schools, in the sense of determining whether to build, selecting and acquiring the site, and having the structures erected, the local school boards are the only bodies or agencies vested with power so to act. They alone have conferred upon them the power to determine the requirements of the public welfare as to number and location of schools in their counties, cities and towns and to decide how that welfare "may best be subserved." *School Board* v. *Shockley*, 160 Va. 405, 414. For annual operational and maintenance expenses funds are made available by the General Assembly and by the local governing bodies, based upon the estimates prepared by the division Superintendent with the advice of the particular

School Board showing the amounts deemed needed for the support of the public schools of the county, city or town for the ensuing school year (§§22-120.3 and 22-120.5). These estimates are submitted to the local governing body, in this particular case the Board of Supervisors, and that body is requested to fix such levy or make such appropriations as will provide the necessary funds (§22-120.4). Thereupon the local governing body, acting for the citizens of the county, levies the taxes or appropriates the funds for the use and benefit of the local school board.

This procedure follows the traditional theory of checks and balances exemplified by Section 5 of the Virginia Bill of Rights—that the whole power should not be exercised by one hand, for it is clear that while the school board has the power and duty to determine the amounts needed for public schools, only the local governing body has the power and duty to determine the financial ability of the people whom they represent. There is no need for this Court to go into further detail in this regard. The Supreme Court of Appeals in *Board of Supervisors* v. *County School Board*, 182 Va. 266, adopted the opinion of the Honorable J. Garland Jefferson, the trial judge, which opinion sets forth clearly both the historical background and present application of the fiscal system on the local level and holds that the local school board is an independent agency charged by law with establishing, maintaining and operating the schools efficiently and that the local governing body, while not entitled to reduce or eliminate individual items of the budget estimates of the school authorities, does have the right, within the limits prescribed by law, in their discretion, to fix the amount of money to be raised by local taxation for school purposes at whatever amount they see fit.

In carrying out its duties under the constitution, the

General Assembly is required to appropriate funds for the use of both State and local school authorities. In its interpretation and construction of the provisions of Article IX of the Constitution it has seen fit to follow the intention of the framers of that document and to require local effort and participation in defraying the costs of the public free schools established in any locality. That this local participation was uppermost in the minds of the members of the Constitutional Convention of 1901-02 cannot be doubted after reading that portion of the Debates of the Convention devoted to the school question. As a result, the General Assembly, in its wisdom, has for many years circumscribed its appropriations for school purposes, except the amounts from the three sources designated by Section 135, forest reserve funds, and the like, with conditions which must be fulfilled by the localities before any appropriated State funds may be spent by or for them.

Beginning with the Appropriation Act of 1916 (Acts of Assembly, 1916, Ch. 520), wherein the sum of $200,000 appropriated to the State Board of Education to be apportioned to the counties for use by the local school authorities in the establishment of one and two room rural schools was conditioned upon the local levies for county school purposes for the year aggregating a sum equal to or greater than the average rate of the levies of county school funds of the Commonwealth, and continuously since that time each successive Appropriation Act has required that county schools be in operation and that certain funds be levied, appropriated, or expended by the local governing body before any of the "State" money becomes available. This makes the local governing body and through it, the people of the locality, the key to the public educational system of this Commonwealth.

The logical conclusion to be drawn from reading together and applying the constitutional and statutory provisions pertinent to the establishment and operation of the public free schools in Virginia is that, fundamentally, it is a system based upon local self-determination or local option. It is the policy of the State to afford an education to its residents. In carrying out this policy the people of Virginia have determined that the residents of each locality shall make the initial determination of what schools will be established and where, and that they will supervise, operate and maintain the local schools, utilizing both State and local revenues and operating under State rules and regulations.

The people of a locality elect the local governing body and, in order to remove them as far as possible from local politics, have their local school board elected by a trustee electoral board composed of resident qualified voters appointed by the Circuit Court. Without the concurrence of these two bodies, the local school board and the local board of supervisors, in the case of a county, the public free schools of the locality cannot be operated, unless there is some power in the General Assembly or some other constitutional officer or agency to establish, operate and maintain such schools without local participation by way of financial assistance.

In *Griffin* v. *Board of Supervisors*, 203 Va. 321, the Supreme Court of Appeals held that mandamus did not lie to control the discretion lodged in the County Board of Supervisors of Prince Edward County to compel the levy and assessment of taxes for the support of public schools and reaffirmed the principle that Section 136 of the Constitution prohibited the General Assembly from exercising the power to determine what additional sums, if any, should be raised by local taxation and to impose local taxes for school purposes. Prior to that decision that Court had held, in

Harrison v. *Day*, 200 Va. 439, that an Act directing that local levies for school purposes be paid into the State treasury under certain circumstances, which funds were to be expended by the State Board of Education in the locality, ran counter to Section 136 of the Constitution which requires that local school taxes be expended by the local school authorities (200 Va., at page 452).

The defendants, State Board of Education and Superintendent of Public Instruction, occupy important roles in the educational system of the Commonwealth. Recognizing the necessity for State supervision of any comprehensive system, the framers of the Constitution created these two agencies or instrumentalities to perform that function in conjunction with the General Assembly. While Section 40 of the Constitution vests the legislative power in the General Assembly without limitation except by other provisions of the Constitution itself, the powers and duties of the State Board of Education are limited in the grants thereof.

Section 130 creates the Board and prescribes that in it shall be vested general supervision of the school system. Section 132 enumerates the powers and duties, as follows:

> "First. It shall divide the State into appropriate school divisions, comprising not less than one county or city each, but no county or city shall be divided in the formation of such divisions. It shall certify to the local school board or boards of each division in the State a list of persons having reasonable academic and business qualifications for division superintendent of schools, one of whom shall be selected as the superintendent of schools for such division by the said school board or boards, as provided by section one hundred and thrity-three of this Constitution.

"Second. It shall have the management and investment of the school fund under regulations prescribed by law.

"Third. It shall have such authority to make rules and regulations for the management and conduct of the schools as the General Assembly may prescribe; but until otherwise provided by law, the State Board of Education may continue existing rules and regulations in force and amend or change the same.

"Fourth. It shall select textbooks and educational appliances for use in the schools of the State, exercising such discretion as it may see fit in the selection of books suitable for the schools in the cities and counties, respectively; provided, however, the General Assembly may prescribe the time in which the State Board of Education may change the textbooks."

Section 133 of the Constitution reiterates the duty of the Board to prepare and certify to local school boards a list of persons eligible for appointment as division superintendents of schools and empowers the State Board to appoint a division superintendent in the event a local school board fails to do so within the time prescribed by law.

In compliance with the duty imposed upon it by Section 129 of the Constitution, the General Assembly has enacted legislation which amplifies the duties imposed on the State Board of Education by that instrument. These statutes appear throughout the School Code and are many in number. Basically, the General Assembly has authorized and required the State Board to adopt rules and regulations for the management and conduct of schools (§ 22-19 of the Code), to "do all things necessary to stimulate and encourage local supervisory activities and interest in the improvement of

the elementary and secondary schools" (§22-21); to prescribe the duties of the Superintendent of Public Instruction in addition to those prescribed by the General Assembly (§22-26); to invest and manage the Literary Fund (§22-101 *et seq.*); to promulgate rules and regulations for the payment of State scholarships (§22-115.33); to examine teachers and certify them as eligible for employment by local school boards (§22-202), and so on. In short, the State Board of Education acts as a supervisory and administrative arm of the State in the functioning of the educational system.

After a careful and comprehensive study of the Constitution of Virginia, the statutes, and the case authorities, this Court is of the opinion that the State Board of Education has neither power nor duty to establish, operate or maintain the public free schools in Prince Edward County or in any other county, city or town in the Commonwealth. It cannot perform its principal function of general supervision unless the schools are open and operating and it cannot apportion or expend a locality's portion of the funds appropriated by the General Assembly unless and until the local governing body provides its proportionate part of the whole amount to which the locality is entitled under the law. There is no question but that the historic method of conditional appropriations may be changed, but even then Section 136 of the Constitution limits the power of establishment of local public free schools to the local school authorities, which would still require the cooperation of local school boards.

The defendant Superintendent of Public Instruction is similarly without any power or duty to establish, operate or maintain the public free schools in any county, city or town. His office is created by Section 131 of the Constitution, which concludes with the sentence:

"The powers and duties of the Superintendent of Public Instruction shall be prescribed by law."

The General Assembly has assigned to him the duties of formulation of such rules and regulations and provision of such assistance in his office as shall be necessary for the proper and uniform enforcement of the school laws in cooperation with the local school authorities (§ 22-25 of the Code). It provided further that he should have additional duties as prescribed by the State Board of Education (§ 22-26) and made him Secretary of the State Board of Education (§ 22-28). Examination of the pertinent statutes and regulations of the State Board reveals that, as a practical matter, the Superintendent of Public Instruction on the State level performs many of the functions of the Division Superintendent on the local level.

In the case of the Superintendent of Public Instruction the Court is unable to find, nor has its attention been directed to, any power in or duty imposed upon the Superintendent to establish, operate or maintain the public free schools in any county, city or town.

The Court is of the opinion that, with respect to the establishment, operation and maintenance of public free schools in Prince Edward County under the facts and circumstances as shown by the evidence in this case, that the County School Board of Prince Edward County and the Division Superintendent of Schools of Prince Edward County have exercised every power and performed every duty incumbent upon them under the Constitution and statutes of Virginia. The Court is of the opinion, further, that, with respect to said schools under the said facts and circumstances, the State Board of Education and the Superintendent of Public Instruction have exercised every power and performed every

duty incumbent upon them under the said Constitution and statutes.

In Paragraph Number 12 of the Amended Complaint, upon which this proceeding is based, it is alleged that the assertion has been and is being made by certain defendants herein that State Scholarship grants are not available to the parents of children resident in Prince Edward County so long as the public schools in the County remain closed. This Court has found that the assertion has been and is in fact being made as evidenced by Plaintiffs' Exhibit # 22. The question necessarily involves consideration of Section 141 of the Constitution of Virginia and the statutes enacted subsequent to the 1956 amendment thereof. Particularly pertinent are the provisions of Chapters 448 and 461, Acts of Assembly, 1960, now codified as §§22-115.29 through 22-115.35 and §§22-115.36 and 22-115.37, respectively, of the Code of Virginia.

The 1956 amendment of Section 141 was adopted after the Comptroller of the Commonwealth had questioned the validity of Item 210 of the Appropriation Act of 1954, which provided for the payment of tuition, institutional fees, room and board, etc., for the secondary or collegiate education of children of Virginia citizens killed in action or totally disabled as a result of military service during World War I and or any armed conflict subsequent to December 6, 1941. The maximum amount of $400.00 per school year per child was to be paid when approved by the Superintendent of Public Instruction. The Comptroller felt that the language used would have made the funds available while such children were attending either sectarian or non-sectarian private schools.

The Supreme Court of Appeals, in which court, the Attorney General had sought a writ of mandamus, considered

whether Section 141 of the Constitution prohibited such payments where the eligible children attended private schools. That Court held that the fact that in the administration of the Act the funds may be paid to the parents or guardians of the children and not directly to the institutions did not alter the underlying purpose and effect of the appropriations—i.e. an appropriation for the benefit of private schools. The Court suggested that if payments for tuition and other expenses of children who attend private schools be a desirable end, it should be accomplished by amending the Constitution of Virginia, since it should not be done by judicial legislation. *Almond* v. *Day*, 197 Va. 419, 426, 431.

Following this decision in November, 1955, Section 141 was amended and now reads:

> "No appropriation of public funds shall be made to any school or institution of learning not owned or exclusively controlled by the State or some political subdivision thereof; provided, first, that the General Assembly may, and the governing bodies of the several counties, cities and towns may, subject to such limitations as may be imposed by the General Assembly, appropriate funds for educational purposes which may be expended in furtherance of elementary, secondary, collegiate or graduate education of Virginia students in public and non-sectarian private schools and institutions of learning, in addition to those owned or exclusively controlled by the State or any such county, city or town; second, that the General Assembly may appropriate funds to an agency, or to a school or institution of learning owned or controlled by an agency, created and established by two or more States under a joint agreement to which this State is a party for the purpose of providing educational facilities for the citi-

zens of the several States joining in such agreement; third, that counties, cities, towns and districts may make appropriations to non-sectarian schools of manual, industrial or technical training, and also to any school or institution of learning owned or exclusively controlled by such county, city, town, or school district."

A careful reading of the Journal of the Constitutional Convention of Virginia (1956) reveals that the Convention was well aware of the fact that local governing bodies throughout the State held the financial keys to the schoolhouses in their respective localities and it was clear, even in 1956, that some of these boards of supervisors and city and town councils might well refuse to levy or appropriate the sums necessary for the participating shares of the localities which were prerequisite to the receipt of State appropriations. The General Assembly so construed the intention of the draftsmen of the Amendment, for in §22-115.32 of the Code, the Section which fixes the amount of local scholarship grant to be added to the amount of the State scholarship, the third alternative is declared to be the total cost of operation, excluding debt service and capital outlay, per pupil in average daily attendance in the public schools of the county, city, or town providing such scholarships, as determined by the Superintendent of Public Instruction for the school year in which public schools were last operated in the locality.

The present scholarship grant statute is the third which has been enacted, both the 1956, Extra Session, and the 1959, Extra Session, statutes, which preceded it, having been repealed in turn. Section 22-115.29 of the Code declares that it is the policy of the Commonwealth to encourage the education of all of the children of Virginia; that to

afford each individual freedom of choice it is desirable and in the public interest to provide public funds for the education of children in non-sectarian private schools, in or outside, and in public schools outside, the locality where the children reside; and that local governing bodies should be authorized to levy taxes and appropriate funds for scholarships.

Section 22-115.30 describes the children eligible and entitled to the State scholarships and fixes the amounts. Section 22-115.31 authorizes local governing bodies to appropriate funds for local scholarships in such amounts as they may deem proper, not less than the minimum set by the statute, while § 22-115.32 describes the children eligible and entitled to receive local scholarships and fixes the minimum amount thereof. Section 22-115.33 directs the State Board of Education to promulgate rules and regulations for the payment of scholarships and administration of the statute. The State Board may prescribe minimum academic standards which must be met by non-sectarian private schools to permit a child attending any such school to receive a scholarship, but the Board is prohibited from regulating as to private school requirements with regard to eligibility of pupils for admission.

Should a local governing body fail to provide local scholarships as authorized by the preceding sections, it is provided in Section 22-115.34 that the State Board of Education shall direct the Superintendent of Public Education to provide for the payment of scholarships on behalf of the county, city, or town concerned. Sums so paid out will be deducted by the Comptroller from other State funds appropriated for distribution to the locality in order to reimburse the State, but no such deductions may be made from funds to which the county, city, or town may be entitled under Title 63 of the Code or for the operation of public schools.

The last section of Chapter 448 of the 1960 Act makes it a misdemeanor for anyone to seek to or to obtain or expend any scholarship funds for any purpose other than that for which they are intended (§22-115.35 of the Code). Sections 22-115.36 and 22-115.37 of the Code authorize and empower the governing bodies of counties, cities and towns to appropriate and expend local funds for educational purposes in furtherance of the elementary and secondary education of children residing in such counties, cities and towns in such amounts as may be provided by ordinance and require express reference to the Article in which the Sections appear before other statutes may be construed in limitation of the powers conferred by §22-115.36.

This Court is unable to find in either the Constitution of Virginia, with particular reference to Sections 129 and 141, or in the above-cited statutes (§§22-115.29 through 22-115.37), or in the Regulations of the State Board of Education, any prohibition, restriction or condition which would prevent the payment of State and local scholarship grants to or for the benefit of any eligible child in the Commonwealth whose parents, or those standing *in loco parentis,* desire that such child attend either a non-sectarian private school within or without the locality of which he is a resident or a public school without that locality. It is clear that the intent and plain language of Section 141 and the intent and plain language of the Scholarship Grant law is to provide the means for the education of each eligible child. If the public schools are in operation in the child's county, city, or town, he has a choice between those public schools, non-sectarian private schools throughout the State and public schools outside the county, city or town. If the public schools are not in operation in his county, city, or town, his choice is limited to non-sectarian private schools anywhere in the State or public

schools outside the locality. By the same token, if there are no non-sectarian private schools in the county, city, or town, the choice is further limited, but the funds for his education are nevertheless available from the State.

No State funds are withheld or diverted by this legislation from any public free schools. The Supreme Court of Appeals has held in *Harrison* v. *Day*, 200 Va. 439, 452, that Section 141 of the Constitution, as amended, authorizing State and local appropriations for the purpose of tuition or scholarship grants places no restriction on the manner in which this is to be done, thus leaving it to the discretion of the General Assembly. The General Assembly, in the exercise of its discretion, has given due regard to the fact that public schools in a locality might be closed and has made provision for the continued education of the children of the Commonwealth in the event such a contingency occurs. In so doing the principle of local option as to the operation of public schools within a county was again recognized.

The Court turns now to the final issue raised by the Complaint as amended and the responses thereto. In paragraph Number 14 of the Complaint as amended a question is raised as to whether the public schools operated and maintained previously in Prince Edward County may remain closed while public schools are operated and maintained in other localities in Virginia without violating some right or rights secured by the Constitution of the United States to the defendants, Leslie Francis Griffin, Sr., and Leslie Francis Griffin, Jr., James L. Carter and Betty Jean Carter, Warren A. Reid and Jacquelyn Reid. Section 1 of Amendment XIV to that Constitution reads as follows:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of

> the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 5 of this Amendment reads:

> "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

The Court is aware of no federal statute requiring a State to provide public free schooling for its citizens, nor is the Court aware of any provision of the Fourteenth Amendment which requires a State either to operate public free schools or to provide State Scholarship grants or any other form of free public education. On the contrary, whether free public education shall be provided is strictly a matter for State determination. *James* v. *Almond*, 170 F. Supp. 331, 337.

This Court has determined above that in this case the actions, on the one hand, and the inability to act, on the other, of the plaintiffs, County School Board of Prince Edward County and the Division Superintendent of Schools of Prince Edward County, and of the defendants, State Board of Education and Superintendent of Public Instruction, do not violate either the Constitution or the statutes of Virginia and that the system of public free schooling established by the General Assembly is predicated upon the theory of home rule or local option. In other words, territorial uniformity is not a constitutional requisite. This is by no means a new feature in Virginia government, nor is it unique when that principle is applied to public education.

Local option as to the sale of beer and other alcoholic beverages within a locality is provided for by the Virginia Alcoholic Beverage Control Act, in particular by §4-45 *et seq.* of the Code. That same Act permits the governing body of each locality to adopt "Sunday" ordinances prohibiting or fixing the hours within which beer and wine may be sold on Sundays (§4-97). Whether juvenile detention facilities will be established in a particular locality is left to the option of the local governing body by §§16.1-201 and 16.1-202 of the Code, participating State funds being provided where the election is made in favor of the establishment of such facilities. In the field of hospitalization and treatment of indigent persons Chapter 15 of Title 32 of the Code provides for State contributions where a county or city elects to participate in the program established by the General Assembly.

The Supreme Court of Appeals of Virginia has recognized consistently the local option or home rule aspect of the system established pursuant to Article IX of the Constitution of Virginia. This Court will not belabor the point further other than to cite the *Griffin* case found reported in 203 Va. 321 and *Harrison* v. *Day*, 200 Va. 439. A study of many federal cases is supportive of the view that the federal courts are of the opinion that a State has the power to pass a local option law without violating constitutional rights. See *Ohio ex rel Lloyd* v. *Dollison*, 194 U. S. 445.

It appears that in each instance the question of ultimate control should be dispositive of the issues presented by local option systems whether they be concerned with education, hospitalization, recreation or any other public facility. If the ultimate control—the final determination of whether a service or privilege is to be furnished to all citizens alike—lies with the State, then to refuse such service or privilege

to any of its citizens, without proper classification, may create an inequality of benefits. But where the people of a locality have the power of self-determination, the situation is different.

The Jacksonville, Florida, cases involving municipal swimming pools and a municipal golf course show that the federal courts recognize and give effect to the local option system. *Hampton* v. *City of Jacksonville*, 304 F. (2d) 319, and *Hampton* v. *City of Jacksonville*, 304 F. (2d) 320. Similarly, where Harris County, Texas, owned and operated a public beach and Greensboro, North Carolina, owned and operated a public swimming pool, the closing of the beach and of the pool to all residents of the localities involved were held not to constitute any unconstitutional discrimination. *Willie* v. *Harris County*, 202 F. Supp. 549 and *Tonkins* v. *City of Greensboro*, 162 F. Supp. 549, aff. 276 F. (2d) 890.

Reference could be made to numerous other decisions of the federal courts confirming this view, but such reference would only prolong this already lengthy opinion. The public free school system of Virginia and her coordinate provision for State and local Scholarship grants are not deemed by this Court to constitute a scheme for the evasion of the decision of the United States Supreme Court in *Brown* v. *Board of Education of Topeka*, 347 U. S. 483. Her adoption of the local option concept long antedates that decision. Further, in many localities other than Prince Edward County that decision is being carried out by the local school authorities and by the local governing bodies. That these other localities have so chosen to act does not make the inaction of the local governing body of Prince Edward County invalid, nor is the converse true.

In sum, the Court is of the opinion that none of the actions

of the plaintiffs, County School Board of Prince Edward County and Division Superintendent of Schools, and of the defendants, State Board of Education and Superintendent of Public Instruction, under the facts and circumstances of this case, in connection with the "non-operation" of public schools in Prince Edward County, have the effect of violating any rights of the defendants Leslie Francis Griffin, Sr., and Leslie Francis Griffin, Jr., James L. Carter and Betty Jean Carter, and Warren A. Reid and Jacquelyn Reid, under the Constitution and laws of Virginia or under the Constitution of the United States, although public free schools are in operation in other localities in the Commonwealth and, therefore, the failure to operate and maintain such schools in Prince Edward County is not violative of any right secured to the six individual defendants next above named.

In view of the length of this letter opinion, necessitated by the many varied issues presented in this case, the Court will not recapitulate its findings here, but rather will fix the date and hour of Wednesday, April 10, 1963, at two o'clock p. m. in chambers at the City Hall, Richmond, for the receipt and consideration of a sketch or sketches for a decree embodying the findings of the Court. At that time the question of a reasonable fee for the guardian ad litem for the infant defendants will be determined. It may be that in the course of this letter the Court has omitted inadvertently reference to some aspect of the case which one or more of the parties is entitled to have considered. Counsel will please be prepared to bring any such matter to the attention of the Court.

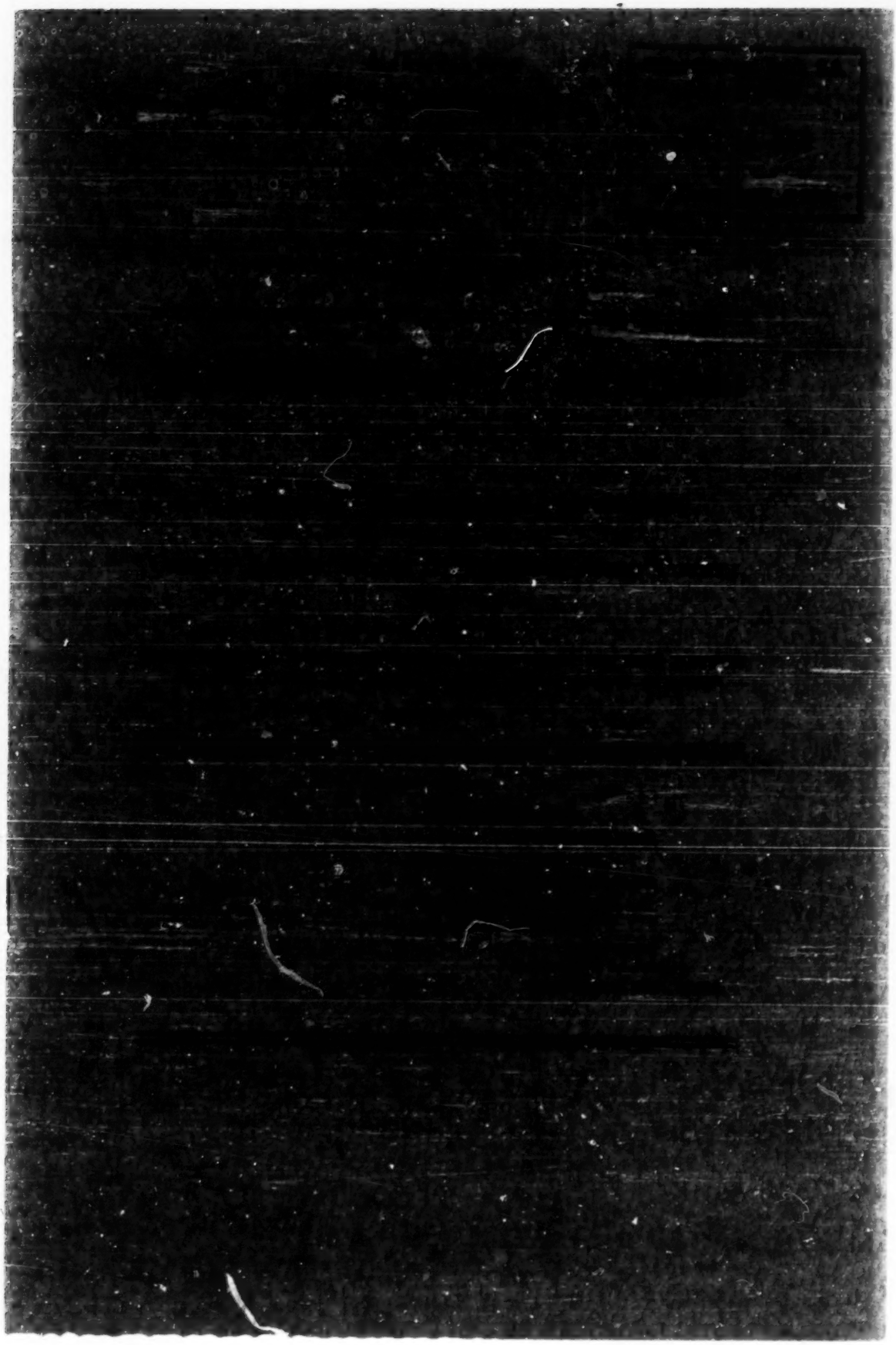
In the event the April 10th, two o'clock p. m., date and hour conflict with the schedule of counsel for any of the parties, it is requested that the Court and other counsel be so informed and the Court will meet with counsel on Satur-

day, April 13, 1963, at ten o'clock a. m., in chambers at the City Hall. The Court wishes to express its appreciation for the many excellent briefs and arguments of counsel for the parties, the guardian ad litem, and of *amicus curiae*.

Very truly yours,

(s) John Wingo Knowles
John Wingo Knowles
Judge

JWK:ft



In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 592

COCHEYSE J. GRIFFIN, ET AL., PETITIONERS

v.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

The United States urges that a writ of certiorari to the United States Court of Appeals for the Fourth Circuit be granted in the above-captioned case.

STATEMENT

This case began twelve years ago as a class action to enjoin discrimination on account of race or color in the assignment of students to the public schools of Prince Edward County, Virginia. Ultimately the case reached this Court, with other cases, in *Brown* v. *Board of Education*, 347 U.S. 483. After the decision in *Brown*, the case was remanded to the district court for implementation of the *Brown* decree "with all deliberate speed." The lower courts have been deliber-

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ating ever since, but this Court's mandate has never been implemented.[1] Instead, the public schools of Prince Edward County have been closed since 1959, and State and county funds have been channeled to so-called "private" schools, restricted to white children, established in the county coincidentally with the abandonment of public education.

In 1956 the Prince Edward County Board of Supervisors, by formal resolution, declared its "policy and intention" not to levy taxes or appropriate funds for public schools "wherein white and colored children are taught together under any plan or arrangement whatsoever" (Pet. App. B). In June of 1959, after the court of appeals had ordered immediate desegregation of the county high schools (266 F. 2d 507), the Board of Supervisors refused to levy school taxes for the 1959–60 school year because, as the Board said in an official statement, it was "confronted with a court decree which requires the admission of white and colored children to all the schools of the county without regard to race or color." (Pet. App. C). Since that time and until the establishment of a temporary privately supported school this year, most Negro children have had no education whatever and others have benefitted only from inadequate makeshift teaching White children, on the other hand, have attended the fully accredited white-only schools operated by the Prince Edward Foundation, which has received significant State and county financial support..

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[1] The district court has rendered four opinions since *Brown*, the court of appeals three, and the Virginia Supreme Court of Appeals two.

During the 1960–61 school year white children attending the Foundation schools obtained State and county tuition grants which exceeded 90% of the total tuition charged by the Foundation. See Va. Code § 22–115.30 *et seq.* In addition, under a county ordinance enacted in 1960 tax credits of up to 25 percent of real and personal property taxes have been allowed for contributions to private schools. This resulted in a contribution to the Prince Edward Foundation of $56,866.22. And the teachers in the Foundation schools—who had moved *en masse* from the white public schools—were permitted under a 1956 law to retain their retirement benefits, accrued while teaching in the public schools, and to remain under the State teacher retirement program. See Va. Code § 51–111.9 *et seq.*[2]

In 1961 the district court enjoined the payment of tuition grants and the allowance of tax credits. 198 F. Supp. 497. In 1962 the district court held that the public schools could not remain closed while public schools operated elsewhere in the State with State support. 207 F. Supp. 349. But the court of appeals, one judge dissenting, held that the district court should have abstained on both questions pending a decision of the Supreme Court of Appeals of Virginia in a case then pending before it[3] (Pet. App. A).

[2] Both the broad state tuition grant laws and the amendment to the teacher retirement laws have their genesis in Virginia's ill-fated "massive resistance" legislation, although the tuition grant laws were substantially changed in 1959 and 1960.

[3] The case before the Supreme Court of Appeals of Virginia was brought by some of the respondents on August 31, 1962, *after* the final decision of the district court.

Since the filing of the present petition, the State Supreme Court has rendered its decision, holding (the Chief Justice dissenting) that the Virginia Constitution compels neither the State nor the county authorities to reopen the schools of Prince Edward County or to furnish funds for the purpose.*

DISCUSSION

1. At the outset, we address ourselves to a potential question of mootness. In a sense, the issue whether the court below properly directed abstention pending interpretation of local law by the State courts presents no live controversy, now that the Virginia Supreme Court of Appeals has spoken. But, in our view, that circumstance does not affect the appropriateness of immediate review by this Court or suggest a remand of the cause to the court of appeals. On the contrary, it seems to us that the ruling of the court below, read together with the opinion of the State court, now constitutes a final instruction to deny the petitioners' federal constitutional claim which will be binding on the district court if left undisturbed. Indeed, the court of appeals appears to have directed the district court to dimiss the complaint if the Virginia court should hold, as it did, that, as a matter of State law, the decision whether to operate public schools is a question of local option, not subject to the control of the central State authorities. It is that proposition which petitioners challenge. Because we agree with them that the answer to the federal con-

* We have reproduced the text of the opinion in an Appendix to this memorandum.

stitutional question does not depend upon any point decided by the Virginia court, but rather on the admitted involvment of the State with the public school system (which was clear before the recent decision), and because the question is of obvious importance, we support the petition for certiorari and urge the Court to set the case down for argument on the merits. There are, moreover, compelling reasons for finally implementing, without further delay, the right of school children to obtain the desegregated public education which was declared in this very case more than nine years ago.

2. Not only is the case ripe for decision, but the federal questions presented are plainly substantial. Thus, contrary to the view expressed below, it seems to us probable that the public support of the so-called "private" schools of Prince Edward County, accomplished by means of the educational grants-in-aid and tax credits struck down by the district court, runs afoul of the injunction of *Cooper* v. *Aaron,* 358 U.S. 1, 19, that "State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the [Fourteenth] Amendment's command that no State shall deny * * * the equal protection of the laws." And, again contrary to the court of appeals, we cannot distinguish away *St. Helena Parish School Board* v. *Hall,* 368 U.S. 515, affirming, 197 F. Supp. 649 (E.D.La.), as applicable only where the decision whether to operate local schools is controlled by the central State authorities. For the Louisiana law there voided indisputably left that

choice to the locality, as here. Nor do we think insuperable the problem of fashioning a proper remedy should the Court hold that Prince Edward County, in the circumstances, is constitutionally bound to re-open its public schools. The Eleventh Amendment does not stand in the way. See *Lincoln County* v. *Luning*, 133 U.S. 529; *Cowles* v. *Mercer County*, 7 Wall. 118; *Kennecott Copper Corp.* v. *State Tax Comm.*, 327 U.S. 573, 579; *Chicot County* v. *Sherwood*, 148 U.S. 529. And there are ample precedents for compelling the assessment of local taxes. *Labette County Commissioners* v. *Moulton*, 112 U.S. 217; *City of Galena* v. *Amy*, 5 Wall. 705; see also *Graham* v. *Folsom*, 200 U.S. 248; *Supervisors* v. *United States*, 9 Wall. 736; *Von Hoffman* v. *City of Quincy*; 4 Wall. 535; *Walkley* v. *City of Muscatine*, 6 Wall. 481; *Cherokee County* v. *Wilson*, 109 U.S. 621; *Riggs* v. *Johnson County*, 6 Wall. 166.

CONCLUSION

We submit that this case is ripe for decision now. However the issues be decided, there can be no question but that they are of fundamental importance not only to the children of Prince Edward County but also to the United States and its system of justice.

Accordingly, we urge that certiorari be granted and the case set down for oral argument at an early date so that, if petitioners are correct on the merits, the public schools of Prince Edward County may be reopened by September 1964.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
BURKE MARSHALL,
Assistant Attorney General.
HAROLD H. GREENE,
ALAN G. MARER,
Attorneys.

DECEMBER 1963.

APPENDIX

Opinion of the Virginia Supreme Court of Appeals, Rendered December 2, 1963

County School Board of Prince Edward County, Virginia, et al.

v.

Leslie Francis Griffin, Sr., et al.

Buchanan J.: This is a declaratory judgment proceeding (Code §§ 8-578 *ff.*) brought in August 1962 by the County School Board and the Division Superintendent of Schools of Prince Edward county, plaintiffs, to obtain adjudication of rights, duties and responsibilities with respect to the operation of public free schools in Prince Edward county.

The defendants named were Leslie Francis Griffin, Sr., James L. Carter and Warren A. Reid and their infant children, respectively, Leslie Francis Griffin, Jr., Betty Jean Carter, and Jacquelyn Reid, eligible to attend public schools in the county. They will be herein referred to as the individual defendants. Also made defendants were the State Board of Education and the Superintendent of Public Instruction.

In general the bill alleged that the individual defendants (who are members of the Negro race) were asserting that plaintiffs and the State Board of Education and Superintendent of Public Instruction have the duty and responsibility under the Virginia Constitution and laws and the Fourteenth Amendment to establish, maintain and operate public free schools in Prince Edward county, which they have failed to do;

that failure to operate such schools violates their constitutional rights; that State scholarship grants in aid of private elementary and secondary education may not be made to parents of children in Prince Edward county so long as public schools there remain closed; and that the plaintiffs and State Board of Education and Superintendent of Public Instruction acquiesced in the refusal of the Board of Supervisors of Prince Edward county to make any levy or appropriate any money for the operation of public schools in the county.

Plaintiffs alleged that there is no duty on them or the State Board of Education or Superintendent of Public Instruction to operate schools unless funds are appropriated therefor, that no local or matching school funds were appropriated to them for operation of schools in Prince Edward county after the 1958–59 school term, and that the closing of public schools in Prince Edward county violates no rights of the individual defendants.

Plaintiffs alleged that the Division Superintendent and County School Board had submitted the estimates of the money needed for the school years 1959–60 through 1962–63 for public schools and for education purposes to the Board of Supervisors with the request that it fix the levy and make appropriations of the funds needed for the operation of said schools as required by Code § 22–120.3 and § 22–120.4; that the Board of Supervisors, however, had refused to levy any tax or make any appropriation for the operation of public schools for said school years and for those years no public schools were operated in the county and so far as the plaintiffs were aware, no funds would be available to them with which to operate public schools for the year 1962–63, although public

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schools during said years were operated by the local school boards in other localities in the State.

Plaintiffs also alleged that the State Board of Education and Superintendent of Public Instruction are asserting that the plaintiffs may not use any funds appropriated to them under § 135 of the Virginia Constitution for the upkeep of any high school in Prince Edward County. Plaintiffs assert that they can use such funds for the upkeep of any school.

The bill further alleged that plaintiffs and the State Board of Education and the Superintendent of Public Instruction have no power or authority and no funds to establish, maintain and operate public schools in Prince Edward county, and that they have performed all the duties and responsibilities imposed upon them by the State Constitution and laws and by the Fourteenth Amendment.

The State Board of Education and the Superintendent of Public Instruction filed their answer asserting that under the facts and circumstances alleged they have no power and no duty to establish, maintain and operate public free schools in Prince Edward county, and that they have no funds with which to do so; and that they have not, either individually or in conjunction with the plaintiffs, acquiesced in the refusal of the Board of Supervisors to levy taxes and appropriate money for the operation of public schools in said county.

No answer was filed by the individual adult defendants. The guardian *ad litem* for the infant defendants filed a motion to dismiss and an answer demanding strict proof of the allegations of the bill.

The case was heard *ore tenus* upon the pleadings, exhibits and the testimony of county and State school officials. The trial court delivered a comprehensive and carefully considered written opinion in which he

found, so far as now material, the following facts, which are clearly supported by the evidence:

(1) Plaintiffs complied with § 22–120.3 and § 22–120.4 of the Code and made estimates of funds needed for public schools and for public educational purposes, and requested the Board of Supervisors to make the necessary levy or appropriation for each of the school years 1959–60, 1960–61, 1961–62 and 1962–63.

(2) The Board of Supervisors of Prince Edward county refused to make any levy or appropriate any funds for the operation of public schools for the years 1959–60 through 1962–63, and as a result of lack of funds no public free schools were operated by the County School Board during those years.

(3) The County School Board expended in the upkeep of the county high schools a part of the "constitutional minimum" appropriation for primary and grammar schools required by § 135 of the State Constitution. For the school year 1960–61 the County School Board expended approximately $3,749.15, and for the year 1961–62 approximately $12,662.95, from these funds on two high school buildings.

(4) During the school year 1959–60 Prince Edward county's proportionate share of the "constitutional minimum" funds under § 135 of the Constitution were earmarked for teachers' salaries by the appropriation act (Item 139, ch. 96, Acts 1950, Ex. Sess.). No public free schools being in operation in the county during that year and no teachers being employed, the county's share of this fund reverted to the general fund of the Commonwealth.

(5) For 1959–60 no State or county scholarship grants were paid to Prince Edward county parents; for 1960–61, 1,332 State grants and 1,363 county grants were paid.

(6) Neither the plaintiffs nor the State Board of Education nor the Superintendent of Public Instruction acquiesced in the refusal of the Board of Supervisors of Prince Edward county to make funds available for the operation of public schools.

(7) No public free schools have been operated in Prince Edward county since the end of the 1958–59 school year. Since 1959 Prince Edward School Foundation, a private enterprise, has operated private, nonsectarian schools in the county. Since 1959 public schools have been in operation in other localities of Virginia.

The decree appealed from was entered on April 10, 1963, which overruled the motion of the guardian *ad litem* to dismiss and adjudicated as follows:

(1) that the plaintiffs have performed all the duties incumbent upon them, and have not acquiesced in the refusal of the Board of Supervisors to levy taxes for public school purposes; and have also exercised all their legal powers with respect to the establishment and operation of public free schools in Prince Edward county;

(2) that the State Board of Education and Superintendent of Public Instruction have no power or duty to establish, maintain or operate public free schools, have performed all duties legally incumbent upon them with respect to said schools, and have not acquiesced in the refusal of the Board of Supervisors to levy taxes for public schools; that except for the minimum funds under § 135 of the Virginia Constitution, these officials cannot apportion and cause to be paid over to any locality any portion of the funds appropriated by the General Assembly for public school purposes unless and until the matching sums, upon the availability of which the payment of such

State funds is conditioned, are provided by the Board of Supervisors;

(3) that neither the United States Constitution nor Federal law requires a State to operate public schools, and none of the actions or inabilities to act of the plaintiffs or the State Board of Education or Superintendent of Public Instruction has violated any rights secured to the individual defendants by the Fourteenth Amendment;

(4) that payment of State scholarship grants to Prince Edward county parents is not conditioned upon the operation of public schools in Prince Edward county;

(5) that Article IX of the Virginia Constitution and statutes enacted pursuant thereto establish a local option or home rule system of public free schools in which the operation of the schools is left to the determination of the local authorities. Receipt of State funds (with the exception of the "absolute appropriation" under § 135 of the Constitution) is conditioned by law upon appropriation of local funds. The election of the governing body of Prince Edward county not to appropriate local funds for public schools and the consequent non-operation of public schools does not violate either the laws or Constitution of Virginia or the Constitution of the United States; and

(6) that expenditure of State funds derived under § 135 of the Constitution for the upkeep of high schools is in violation of § 135, and is enjoined.

Appellants, plaintiffs below, assigned error to the last mentioned ruling. We hold that this question was correctly decided.

Section 135 of the Constitution, quoted below, provides that the annual interest on the literary fund, the State's share of the capitation tax and an amount

equal to the annual tax on property of not less than one nor more than five mills on the dollar (together constituting what is commonly referred to as the "constitutional minimum" or "absolute appropriation"), shall be applied by the General Assembly "to the schools of the primary and grammar grades, for the equal benefit of all the people of the State." If this plainly stated purpose needs further clarification, it may be found in the Debates of the Constitutional Convention of 1901–1902 on the report of the Committee on Education and Public Instruction, where at page 1193 the chairman of the committee, Mr. McIlwaine, stated:

> "The next change is that the tax on property of not less than one nor more than five mills on one dollar shall be appropriated to the public free schools of the primary and grammar grades. That is to say, that the whole tax furnished by the State is to be paid for the education of the children in the primary and grammar grades. None of it is to go to the high schools. That is provided for in the latter part of this section."

Similar expressions appear at pages 1199–1201. It is clear that the limitation expressed in the section was deliberate and that the funds constituting the constitutional minimum under § 135 must be devoted to the schools of the primary and grammar grades, and none of it may be spent for the care and maintenance of the high school buildings, as the trial court properly held.

The guardian *ad litem* for the infant defendants assigned cross-error to the refusal of the trial court to dismiss the bill and to strike the evidence as to the infants. The motion was made on the ground that whatever controversy existed between the plaintiffs and the infant defendants was already in process of

litigation in *Allen, et al.* v. *County School Board of Prince Edward County, et al.*, pending on appeal in the Fourth Circuit, *sub nom., Griffin, etc., et al.* v. *County School Board of Prince Edward County, et al.* A decision was rendered in that case on August 12, 1963, reported in 322 F. 2d 332, in which the judgments of the District Court were vacated and the case remanded with instructions to that court to abstain from conducting further proceedings until this court decided the present case. The motion of the guardian *ad litem* was properly overruled.

The principal question here is, of course, whether the trial court was correct in its holding that Article IX of the Virginia Constitution and the statutes enacted pursuant thereto establish a local option system of public free schools in Virginia which leaves to the local authorities the decision of whether public free schools shall be operated in the locality. Stated another way, the question is whether the Commonwealth of Virginia is required and has the mandatory duty under its Constitution and laws to establish, maintain and operate public free schools in Prince Edward county.

Its duty is to obey the voice of its people as spoken in its Constitution, unless the commands there given are forbidden by the Federal Constitution. The present Constitution of Virginia was ordained in 1902 and the will of the people with respect to the subject of "Education and Public Instruction" is set out in Article IX, composed of fourteen sections, numbered from 129 through 142. Only §§ 129 through 136 and § 141 are material to the present question and they are set forth in the margin, either verbatim or in relevant part.*

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*§ 129. Free schools to be maintained.—The General Assembly shall establish and maintain an efficient system of public free schools throughout the State.

In construing these sections we are required to apply these established rules:

"The constitution must be viewed and construed as a whole, and every section, phrase

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§ 130. State Board of Education; composition; vacancies, how filled.—The general supervision of the school system shall be vested in a State Board of Education, to be appointed by the Governor, subject to confirmation by the General Assembly, and to consist of seven members. * * *

§ 131. Superintendent of Public Instruction; appointment; term of office; how elected; duties.—A Superintendent of Public Instruction, who shall be an experienced educator, shall be appointed by the Governor, subject to confirmation by the General Assembly, for a term coincident with that of each Governor making the appointment; * * * provided * * * that the General Assembly shall have power, by statute enacted after January first, nineteen hundred and thirty-two, to provide for the election or appointment of a Superintendent of Public Instruction in such manner and for such term as may be prescribed by statute. * * * The powers and duties of the Superintendent of Public Instruction shall be prescribed by law.

§ 132. Powers and duties of State Board of Education.—The duties and powers of the State Board of Education shall be as follows:

First. It shall divide the State into appropriate school divisions, comprising not less than one county or city each, but no county or city shall be divided in the formation of such divisions. It shall certify to the local school board or boards of each division in the State a list of persons having reasonable academic and business qualifications for division superintendent of schools, one of whom shall be selected as the superintendent of schools for such division by the said school board or boards, as provided by section one hundred and thirty-three of this Constitution.

Second. It shall have the management and investment of the school fund under regulations prescribed by law.

Third. It shall have such authority to make rules and regulations for the management and conduct of the school as the General Assembly may prescribe; but until otherwise provided by law, the State Board of Education may continue existing

and word given effect and harmonized if possible. * * *." *Dean* v. *Paolicelli*, 194 Va. 219, 226, 72 S.E. 2d 506, 511.

"Legislative construction of a constitutional provision is entitled to consideration, and if the

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rules and regulations in force and amend or change the same.

Fourth. It shall select textbooks and educational appliances for use in the schools of the State, exercising such discretion as it may see fit in the selection of books suitable for the schools in the cities and counties, respectively; provided, however, the General Assembly may prescribe the time in which the State Board of Education may change the textbooks.

§ 133. School districts; school trustees.—The supervision of schools in each county and city shall be vested in a school board, to be composed of trustees to be selected in the manner, for the term and to the number provided by law. Each magisterial district shall constitute a separate school district, unless otherwise provided by law, and the magisterial district shall be the basis of representation on the school board of such county or city, unless some other basis is provided by the General Assembly, provided, however, that in cities of one hundred and fifty thousand or over, the school boards of respective cities shall have power, subject to the approval of the local legislative bodies of said cities, to prescribe the number and boundaries of the school districts.

The General Assembly may provide for the consolidation, into one school division, of one or more counties or cities with one or more counties or cities. The supervision of schools in any such school division may be vested in a single school board, to be composed of trustees to be selected in the manner, for the term and to the number provided by law. Upon the formation of any such school board for any such school division, the school boards of the counties or cities in the school division shall cease to exist.

There shall be appointed by the school board or boards of each school division, one division superintendent of schools, who shall be selected from a list of eligibles certified by the State Board of Education and shall hold office for four years. In the event that the local board or boards fail to elect a division superintendent within the time prescribed by law, the

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construction be contemporaneous with adoption of the constitutional provision, it is entitled to great weight. * * * Long acquiescence in such an announced construction so strengthens it

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State Board of Education shall appoint such division superintendent.

§ 134. Literary fund.—The General Assembly shall set apart as a permanent and perpetual literary fund, the present literary fund of the State; the proceeds of all public lands donated by Congress for public free school purposes; of all escheated property; of all waste and unappropriated lands; of all property accruing to the State by forfeiture, and all fines collected for offenses committed against the State, and such other sums as the General Assembly may appropriate; provided that when and so long as the principal of the literary fund amounts to as much as ten million dollars, the General Assembly may set aside all or any part of moneys thereafter received into the principal of said fund for public school purposes including teachers retirement fund to be held and administered in such manner as may be provided by general law.

§ 135. Appropriations for school purposes, school age.—The General Assembly shall apply the annual interest on the literary fund; that portion of the capitation tax provided for in the Constitution to be paid into the State treasury, and not returnable to the counties and cities; and an amount equal to the total that would be received from an annual tax on the property of not less than one nor more than five mills on the dollar to the schools of the primary and grammar grades, for the equal benefit of all the people of the State, to be apportioned on a basis of school population; the number of children between the ages of seven and twenty years in each school district to be the basis of such apportionment. And the General Assembly shall make such other appropriations for school purposes as it may deem best, to be apportioned on a basis to be provided by law.

§ 136. Local school taxes.—Each county, city or town, if the same be a separate school district, and school district is authorized to raise additional sums by a tax on property, subject to local taxation, not to exceed in the aggregate in any one year a rate of levy to be fixed by law, to be apportioned and expended by the local school authorities of said counties, cities,

that it should not be changed unless plainly wrong. * * *." 194 Va. at 227, 72 S.E. 2d at 511.

"The public school system has been created and developed by virtue of the several constitutional and statutory provisions. The system is embodied in no single provision. In order to arrive at an understanding of the school system as created and developed, we must read and consider all of the related provisions of the law together and analyze them in a comprehensive manner. In no other way can they be

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towns and districts in establishing and maintaining such schools as in their judgment the public welfare may require; provided that such primary schools as may be established in any school year shall be maintained at least four months of that school year, before any part of the fund assessed and collected may be devoted to the establishment of schools of higher grade. The boards of supervisors of the several counties, and the councils of the several cities and towns, if the same be separate school districts, shall provide for the levy and collection of such local school taxes.

§ 141. State appropriations prohibited to schools or institutions of learning not owned or exclusively controlled by the State or some subdivision thereof; exceptions to rule.—No appropriation of public funds shall be made to any school or institution of learning not owned or exclusively controlled by the State or some political subdivision thereof; provided, first, that the General Assembly may, and the governing bodies of the several counties, cities and towns may, subject to such limitations as may be imposed by the General Assembly, appropriate funds for educational purposes which may be expended in furtherance of elementary, secondary, collegiate or graduate education of Virginia students in public and nonsectarian private schools and institutions of learning, in addition to those owned or exclusively controlled by the State or any such county, city or town; second * * *; third, that counties, cities, towns and districts may make appropriations to nonsectarian schools of manual, industrial or technical training and also to any school or institution of learning owned or exclusively controlled by such county, city, town or school district.

> properly construed and applied. * * *." *Board of Supervisors* v. *Cox,* 155 Va. 687, 708, 156 S.E. 755, 762 (1931).

Section 129 of the Constitution which, as we said in *Griffin* v. *Board of Supervisors of Prince Edward County,* 203 Va. 321, 327, 124 S.E. 2d 227, 232 (1962), is plainly directed to the General Assembly and not to the local governing bodies, says "The General Assembly shall establish and maintain an *efficient system* of public free schools throughout the State." [Emphasis added.] It does not say that the General Assembly shall operate the schools, or any school. Had that been the purpose it would have been easy to say so. In that event the word "system" that was used would have had no place, and the simple sentence "The General Assembly shall establish and operate efficient public free schools throughout the State" would have put the matter beyond doubt.

Section 129 is not self-executing. It leaves to the judgment of the General Assembly the manner and means of its execution implemented with no further requirement other than that of § 136 with respect to the application of the constitutional minimum funds, and subject to the provision of § 186 of the Constitution that "No money shall be paid out of the State treasury except in pursuance of appropriations made by law."

> "Says Cooley in his work on Constitutional Limitations, p. 121: 'A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be employed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force

of law.'" *Newport News* v. *Woodward,* 104 Va. 58, 61–2, 51 S.E. 193, 194.

A constitutional provision is not self-executing "'when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law. Thus, a constitution may very clearly require county and town government; but if it fails to indicate its range, and to provide proper machinery, it is not in this particular self-executing, and legislation is essential.'" *Davis* v. *Burke,* 179 U.S. 399, 403, 45 L. ed. 249, 251, — S. Ct. —, —.

We have commented on the meaning and requirement of § 129 on more than one occasion. In *Scott County School Bd.* v. *Scott County Bd. of Supervisors,* 169 Va. 213, 215, 193 S.E. 52, 53 (1937), we said:

> "The Constitution provides that it shall be the duty of the General Assembly to provide for and maintain the public school system (Constitution, section 129), and the General Assembly has complied with that requirement by the enactment of a School Code, Acts 1928, ch. 471, as amended, Michie's Code 1936, sections 611 to 718, inclusive; and again by Acts of Assembly of 1936, ch. 314, p. 497."

Several years before that we said in *Board of Supervisors* v. *Cox, supra,* 155 Va. at 707, 156 S.E. at 761:

> "It appears that the General Assembly, in obedience to the mandatory provisions of the Constitution, has established a State wide, efficient, free school system. It enacted a comprehensive school code and created a State Board of Education to carry through the plans for the establishment and maintenance of the school system."

When we look at the other sections of Article IX companion to § 129, it seems clear that it was never

the intendment of the Constitution to make it the duty of the General Assembly to operate the schools.

Section 130 provided for the appointment of a State Board of Education and gave it the general supervision of the "school system" to be established and maintained.

Section 131 provided for the appointment of a Superintendent of Public Instruction with powers and duties to be prescribed by law.

The "powers and duties" of the State Board of Education were defined in § 132. It was required to divide the State into school divisions of not less than one county or city each. It must certify to the local school boards a list of persons suitable for selection by the local school board as division superintendent of schools. It was given the management and administration of the school fund, the authority to make rules and regulations for the management and conduct of the schools as the General Assembly might prescribe and to select textbooks and educational appliances.

Section 133 vested the supervision of the schools in each county and city in a local school board, to be selected as provided by law, and that board shall select a division superintendent from a list certified by the State Board of Education. It was amended in 1950 to provide for the consolidation of schools.

Having thus given form to the system of schools which it directed the General Assembly to establish and maintain, the framers of the Constitution turned to the matter of the operation of the system to be established. It could not, of course, be operated without money, and the following sections deal with that and other matters of operation:

Section 134 established the literary fund and it was amended in 1944 to empower the General Assembly

to set aside parts thereof above ten million dollars for public school purposes.

Section 135 required the General Assembly to apply to the schools of the primary and grammar grades (generally accepted as meaning the grades below high school) the constitutional minimum funds above referred to. It then permitted the General Assembly to make such other appropriations for school purposes "as it may deem best."

Then § 136 authorized each school district to raise additional sums by a tax on property, to be apportioned and expended by the local school authority *"in establishing and maintaining such schools as in their judgment the public welfare may require* [emphasis added];" provided that the primary schools so established must be maintained at least four months before any of the money can be used to establish schools of higher grade.

The limitations upon the power and authority of the General Assembly with respect to schools and their operation imposed by these sections of the Constitution have frequently been recognized and applied by this court.

In *School Board of Carroll County* v. *Shockley*, 160 Va. 405, 168 S.E. 419 (1933), the General Assembly undertook by statute to require the Board of Supervisors of Carroll county to make a special levy for erecting and equipping a high school building in the county. The statute was held to be unconstitutional because:

> "The local authorities of each county and school district being thus vested with the exclusive power to impose local taxes for school purposes under this section [136], the necessary implication is that the General Assembly is prohibited by the Constitution from exercising that power.

> "This construction of the section (136) is in accordance with the interpretation placed upon it by the legislature itself in the statutes relating to the subject."

Then follow a reference to the illustrative statutes and this statement:

> "As seen, the act under consideration directs that the proceeds of the levy thereby imposed shall be used solely for the purpose of paying for the erection and equipment of a high school building at Hillsville, thereby depriving the local authorities of Carroll county of the power conferred upon them by the Constitution of determining for themselves the requirements of the public welfare, and, by the exercise of their own judgment, deciding how that welfare may best be subserved." 160 Va. at 413–4, 168 S.E. at 422–3.

This power of determination by the local authorities with respect to " 'establishing and maintaining such schools as in their judgment the public welfare may require' " was coupled with the authority given by § 136 to raise additional school funds in realization, said the opinion, "that the funds provided by the State might not be sufficient to maintain an efficient system of schools throughout the Commonwealth." 160 Va. at 412, 168 S.E. at 422.

In *Board of Supervisors of Chesterfield County* v. *County School Board,* 182 Va. 266, 28 S.E. 2d 698 (1944), some of the history of the public school system in Virginia as far back as the Code of 1849 was reviewed, the provisions of §§ 129, 133 and 136 of the 1902 Constitution and statutes enacted thereunder were considered and the conclusion reached:

> " 'From the beginning the school boards have been made bodies corporate. They have been given the responsibility by law of establishing, maintaining and operating the school system,

> along with the State Board of Education, Superintendent of Public Instruction and the Division Superintendent of Schools.
>
> * * * * *
>
> "' * * * the Constitution of Virginia and the statutes of the State clearly set up the school board as an independent local agency charged by law with establishing, maintaining and operating "an efficient system of public free schools". It would be illogical to make the School Board solely responsible for the efficient conduct of the school system, and then give another board control over the expenditures to be made by the School Board. The school boards, because of the duties placed upon them by law, know accurately its personnel, its mode and manner of operation and the importance of the various parts of the system. This information the board of supervisors do not have * * * .'" 182 Va. at 275–6, 28 S.E. 2d at 702.

Again in the landmark case of *Harrison* v. *Day*, 200 Va. 439, 106 S.E. 2d 636 (1959), the several statutes enacted by the General Assembly at its 1956 extra session to prevent the integration of the public schools, were declared unconstitutional because they breached the limitations placed by Article IX of the Constitution on the powers of the General Assembly with respect to operating public free schools. There we rejected the contention of the Attorney General that the General Assembly had plenary power to deal the public free school system in any manner it deemed fit "unfettered by any requirements of, or limitations in, the Constitution of Virginia." 200 Va. at 446, 106 S.E. 2d at 643. Specifically we held that the Act which provided for the closing of schools because of integration, divested local authorities of all power and control over them and vested such authority in the Governor, violated § 133 of the

Constitution which vests the supervision of local schools in the local school board; that the Act which provided for the establishment and operation of a State school system to be administered by the Governor and under the State Board of Education violated § 133; and that the provision of that act which directed local school levies to be paid into the State treasury to be expended by the State Board of Education violated § 136 of the Constitution which requires that local school taxes be expended by the local school authorities.

> "* * * The legislature in adopting means to establish and maintain an efficient school system must do so within the framework of the Constitution." *Almond* v. *Gilmer,* 188 Va. 1, 30, 49 S.E. 2d 431, 446.

The only funds for the operation of public schools required to be furnished by the General Assembly are the three funds constituting the "constitutional minimum" referred to above. As indicated above, Prince Edward county's share of these funds is wholly insufficient for operating the public schools in that county. During the school year 1960–61 the amount received by the School Board from this source was $39,360, which it expended, together with $2,644.40 "forest reserve fund," (Code § 22–119), for administration, maintenance of buildings, insurance and debt service, leaving a balance of $252.08 at the close of that year; and for the year 1961–62 the amount received was $39,360 plus $2,181.27 "forest reserve," which was expended for like purposes, leaving a balance at the end of that year of $156.28.

Section 135 authorizes the General Assembly to make such other appropriations for school purposes "as it may deem best." It has deemed it best to make such other appropriations on a conditional or match-

ing basis, requiring the appropriation of funds by the localities, to be raised and expended as provided by § 136 by local school authorities "in establishing and maintaining such schools as in their judgment the public welfare may require." As said by the trial judge in his very thorough opinion:

> "Beginning with the Appropriation Act of 1916 (Acts of Assembly, 1916, Ch. 520), wherein the sum of $200,000 appropriated to the State Board of Education to be apportioned to the counties for use by the local school authorities in the establishment of one and two room rural schools was conditioned upon the local levies for county school purposes for the year aggregating a sum equal to or greater than the average rate of the levies of county school funds of the Commonwealth, and continuously since that time each successive Appropriation Act has required that county schools be in operation and that certain funds be levied, appropriated, or expended by the local governing body before any of the 'State' money becomes available. This makes the local governing body and through it, the people of the locality, the key to the public educational system of this Commonwealth."

That this has consistently been the pattern of appropriation through the years may be seen by reference to Acts 1918, pp. 693–4, 727; Acts 1928, pp. 394, 458; Acts 1938, pp. 819–20, 890; Acts 1960, p. 995; Acts 1962, pp. 1334–6.

These essential local funds have to be provided by the local governing bodies. The Board of Supervisors, the governing body of Prince Edward county, has since the school year 1958-59 refused to make appropriation of these necessary funds. It cannot be compelled to do so by the General Assembly, by this court, or by any authority except its own people.

We so decided last year in *Griffin* v. *Board of Supervisors of Prince Edward County, supra.* There we held:

> "Article IX of the Constitution, embracing the subjects of 'Education and Public Instruction,' contemplates that moneys for the establishment and maintenance of public free schools will be appropriated partly by the General Assembly and partly by the local governing units. Section 136 provides for the raising by local taxation of 'additional sums,' that is, sums in addition to those which the General Assembly may appropriate pursuant to the preceding sections of the Constitution."
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> * * * * *
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> "We find in neither Section 136 of the Constitution nor in the statutes implementing it, any support for the petitioners' contention that the Board of Supervisors is under the mandatory duty to levy local taxes and appropriate moneys for the support of public free schools in the county." 203 Va. at 324–5, 124 S.E. 2d at 230–1.

We said that the first sentence of § 136 "authorized" the local political unit to raise additional sums, and that the word "authorized" denotes a grant of power and discretion to act but not a command or requirement; and the closing sentence of § 136, "The boards of supervisors of the several counties, * * * shall provide for the levy and collection of such local school taxes," does not impose a mandatory duty on the Board to levy and appropriate these moneys. We referred to the holding in *School Board of Carroll County* v. *Shockley, supra,* that under § 136 the local authorities had the exclusive power to determine when additional funds, if any, should be raised by local taxation to supplement the funds provided by

the State, with the exclusive power to levy the tax for school purposes, and

> "'The local authorities of each county and school district being thus vested with the exclusive power to impose local taxes for school purposes under this section, the necessary implication is that the General Assembly is prohibited by the Constitution from exercising that power.'" 203 Va. at 326, 124 S.E. 2d at 232.
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> "Since the early days of the Commonwealth, we have repeatedly pointed out that the exercise of the power of taxation is a legislative function. * * * The same is true when the power is exercised by a local governing unit. * * *." 203 Va. at 328, 124 S.E. 2d at 233.

Because of the refusal of the County Board of Supervisors of Prince Edward county to appropriate funds, the public free schools in the county are closed. We find nothing in the provisions of the Constitution that makes it the duty of the General Assembly in that case to take over these schools and operate them. As we have said in previous cases, it has performed the mandatory duty laid on it by § 129 of establishing and maintaining a system of public free schools throughout the State, and implementing it by School Codes.

Following the adoption of the Constitution, the General Assembly met in extra session and adopted a School Code, Acts Ex. Sess., 1902–3–4, ch. 509, p. 798. In § 1466 thereof it committed the management, control and operation of the public free schools to the district boards of school trustees, directing that board to build and equip school houses, employ and pay teachers, make rules for the government of the schools and conduct of the pupils; to call meetings of the people to consult as to school interests, and to take care that the schools were conducted according to law and with the utmost efficiency.

The present School Code is Title 22 of the Code as amended. This School Code does not require the establishment, maintenance or operation of any school anywhere in the State. It sets up a system under which public schools may be established, maintained and operated with local support and under local control, in accord with the other provisions and conditions of the Constitution. So it is provided by § 22–126 of the Code that each locality is authorized to raise money by a tax on property, to be expended by the local school authorities "in establishing, maintaining and *operating* such schools as in their judgment the public welfare requires, * * *." [Emphasis added.]

Such has been the General Assembly's interpretation of its duty under the Constitution for more than half a century, without dissent from the people. It seems late to say that it has failed to discharge its constitutional duty over this long period and has put a burden on the localities which they are not required to bear.

The Board of Education, the Superintendent of Public Instruction and the local school boards are, as we held in *Kellam* v. *School Board,* 202 Va. 252, 117 S.E. 2d 96, agencies of the State in the performance of their duties, but the State has committed to them by its Constitution and laws no duty, no power and no means to operate public free schools apart from the will of the people of the localities as expressed by the local governing bodies.

The General Assembly may determine for itself what is an "efficient system" of public free schools so long as it does not impair or disregard constitutional requirements. *Harrison* v. *Day, supra,* 200 Va. at 451, 106 S.E. 2d at 653.

It is for the General Assembly first to determine whether the failure of a locality to cooperate and assume its responsibility renders the system inefficient. It doubtless has the power to shape its appropriations for public schools under § 135 of the Constitution to correct an inefficiency in its established system, but that is in the area of legislative discretion, not in itself a constitutional requirement. The question of the efficiency of the system and whether it meets the constitutional requirement of § 129 becomes a matter of law only if it clearly appears that the system has broken down and adherence to it amounts to a disregard of constitutional requirements.

If the Constitution makes it the duty of the General Assembly to take over and operate the schools in Prince Edward county, it would have the same duty with respect to all other counties and cities of the State. The result would be a centralization of control and of operation foreign to the spirit as well as the letter of the Constitution, and the destruction of the system adopted in good faith obedience to the requirements of the Constitution and used now for more than sixty years.

We think it clear that the Constitution as written does not make that requirement.

The Debates of the Constitutional Convention on the report of the Committee on Education and Public Instruction, from which came the present constitutional provisions, indicate that the method adopted by the General Assembly is in keeping with the requirements of Article IX. In the course of the debate an amendment was offered which would have required the State constitutional funds to be used to maintain primary schools for at least four months in each year. The proposed amendment did not find

support and was withdrawn. Debates Constitutional Convention 1901–1902, vol. 1, pp. 1213–1218, 1229–1231. In the entire debate on the report no member made the direct proposal that the operation of the schools be placed in other than local hands. The proceedings indicate a purpose to leave the State only with the duty of establishing a system which would enlist the support of the localities and leave to them the determination of the number and character of the schools they were willing to operate. A member of the committee expressed it to be his understanding that "the report of this committee has as its underlying principle and its basis local self-government and home rule." "The discretion as to whether any or all schools are established is first vested in the local trustees, * * *." Debates, pp. 1227–8.

As noted above, the trial court decided that the payment of State scholarship grants to the parents of children residing in Prince Edward county is not conditioned upon the operation of public free schools in the county and that such scholarships are available under §§ 22–115.29 ff. of the Code, even though the public schools in the county are closed.

The constitutional authority for these scholarship or tuition grants is § 141 of that instrument as amended in 1956, which provides, in relevant part, that the General Assembly and the local governing bodies, subject to the limitations imposed by the General Assembly, may "appropriate funds for educational purposes which may be expended in furtherance of elementary, secondary, collegiate or graduate education of Virginia students in public and nonsectarian private schools and institutons of learning, in addition to those owned or exclusvely controlled by the State or any such county, city or town * * *."

Harrison v. *Day, supra,* 200 Va. at 452, 106 S.E. 2d at 647, states:

> "We find no constitutional objection to the prescribed procedure for making tuition grants out of funds properly available for the purpose. Section 141 of the Constitution, as amended, authorizing State and local appropriations for this purpose places no restriction on the manner in which this is to be done, thus leaving it to the discretion of the General Assembly."

The present tuition grants law was enacted by the General Assembly by Acts 1960, ch. 448, p. 703, now codified as §§ 22-115.29 through 22-115.35. These sections provide for the granting of State and local scholarships without reference to race or creed. Section 22-115.30 provides:

> "Every child in this Commonwealth between the ages of six and twenty who has not finished or graduated from high school, and who desires to attend a nonsectarian private school located in or outside, or a public school located outside, the locality in which such child resides, shall be eligible and entitled to receive a State scholarship in the amount of one hundred and twenty-five dollars per school year, if attending an elementary school and one hundred fifty dollars if attending a high school."

Section 22-115.31 authorizes localities to provide local scholarships, for the education of children residing therein, in nonsectarian private schools located in or outside, and in public schools located outside, the locality.

Section 22-115.32 makes every child between six and twenty years of age residing in the locality who has not finished high school eligible for such local scholarships.

Section 22–115.34 provides that if the locality fails to provide such scholarships, the State Board of Education may direct the Superintendent of Public Instruction to do so, and the amount thereof shall be deducted from other State funds appropriated to such locality, but not from any funds to which the locality is entitled as welfare funds or for the operation of public schools.

We perceive nothing in or out of the statutes to render these scholarships unavailable to any eligible child in Prince Edward county whether public free schools are operated in the county or not.

The trial court further held, as noted, that neither the Fourteenth Amendment nor any Federal statute requires a State to operate public free schools and that the failure of the local authorities of Prince Edward county to do so does not violate the rights of any of its citizens under the Fourteenth Amendment, although public free schools are operated in other localities in the Commonwealth.

This holding is supported by the recent decision in *Griffin* v. *Board of Supervisors of Prince Edward County, supra,* 322 F. 2d 332, in which in an able opinion by Judge Haynsworth, the court said:

> "As to the plaintiffs' contention, it may be summarily dismissed insofar as it is viewed as a contention that the Fourteenth Amendment requires every state and every school district in every state to operate free public schools in which pupils of all races shall receive instruction. The negative application of the Fourteenth Amendment is too well settled for argument [citing cases]. It prohibits discrimination by a state, or one of its subdivisions, against a pupil because of his race, but there is nothing in the Fourteenth Amendment which requires a state, or any of its political subdivisions with

> freedom to decide for itself, to provide schooling for any of its citizens. Schools that are operated must be made available to all citizens without regard to race, but what public schools a state provides is not the subject of constitutional command." (p. 336)
>
> "* * * when there is a total cessation of operation of an independent school system, there is no denial of equal protection of the laws, though the resort of the poor man to an adequate substitute may be more difficult and though the result may be the absence of integrated classrooms in the locality." (p. 337)

After citing Federal cases in support of that principle, the court continued:

> "Other courts have clearly held that a municipality which had been ordered to desegregate facilities which it had operated, may abandon the facilities without violating the injunctive order or the rights of the Negro plaintiffs [citing cases]. The only limitation of the principle is that a municipality may not escape its obligations to see that the public facilities it owns and operates are open to everyone on a nondiscriminatory basis by an incomplete or limited withdrawal from the operation of them. If the municipality reserves rights to itself in disposing of facilities it formerly owned and operated, subsequent operation of those facilities may still be 'state action.'" (p. 337)

As we have pointed out, the Constitution and laws of Virginia have given to its localities an option to operate or not to operate public schools. Like options have been granted in other areas of governmental activities. Sections 16–1.201–2 provide for establishing local juvenile detention facilities. No county is required to construct one, but if it elects to do so the State will contribute to the cost of construction and operation. Similar provisions exist with respect to

the State-local hospitalization program under §§32–292 *ff.* of the Code. As said in *Griffin* v. *Board of Supervisors*, 322 F. 2d at 342:

> "Federal analogies readily come to mind. The United States makes available to participating states which enact prescribed legislation, grants for unemployment compensation administration. Under the National Defense Education Act, federal funds are made available to localities conducting in their schools approved programs of science, mathematics and foreign languages. It is suggested that there is no geographic discrimination in the provision for such optional grants, though a state or locality may exercise its option not to participate." (p. 342)
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> "The rule is well settled that the Constitution of the United States in securing the equal protection of the laws does not prohibit legislation which is limited as to the territory within which it is to operate. * * * All that the Federal Constitution requires is that they shall be general in their application within the territory in which they operate." 12 Am. Jur., Constitutional Law, § 488, p. 167.
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> "* * * Territorial uniformity is not a constitutional requisite. * * *." *Salsburg* v. *State of Maryland*, 346 U.S. 545, 552, 98 L. ed. 281, —, 74 S. Ct. 280, 284.

No public official or public agency has assisted in the establishment or operation of the private schools conducted by the Prince Edward School Foundation. In *Griffin* v. *Board of Supervisors, supra,* 322 F. 2d at 338, it is said, and it is also true in the present case, that there is no suggestion that any agency or official of the Commonwealth or the county has any authority to supervise the operation of the schools of the Foundation except insofar as Virginia exercises a general police supervision over all private schools and has ac-

credited the schools of the Foundation where they met the requirements applicable to all private schools.

Our conclusion is that the trial court on this and all other questions discussed herein has decided correctly, and its decree is therefore

Affirmed.

SPRATLEY, WHITTLE, SNEAD, I'ANSON AND CARRICO, JJ., Concurring. EGGLESTON, C. J., Dissenting.

SPRATLEY, WHITTLE, SNEAD, I'ANSON and CARRICO, Justices Concurring.

We agree completely with the reasoning and conclusions of the majority opinion. We deem it appropriate to add these comments:

Our task here is to construe a Constitution, not to provide a remedy for a "shameful" situation, as the dissenting opinion characterizes the closing of public free schools in Prince Edward county, however regrettable that situation may be. That condition may be corrected, but an erroneous construction of the Constitution in an effort to furnish a remedy will be more difficult to correct.

The dissenting opinion agrees that the Constitution contemplates that the funds necessary for the operation of schools will be supplied partly by appropriations by the General Assembly and partly by appropriations by the local governing bodies; but, it asserts, if a single local governing body defaults in its obligation to supply the necessary funds for the operation

of its schools, it then becomes the duty of the General Assembly to provide, for the use of the local school board in that community, the necessary funds with which the latter may operate the schools there.

If that be held to be the constitutional duty of the General Assembly, it takes little imagination to visualize the result. Very soon many, if not all, of the counties and cities of the State would cease making local appropriations and the schools would have to be financed entirely by State funds. Thus would come to an end the joint effort admittedly contemplated by the Constitution and in effect now for more than sixty years.

Where in the Constitution may be found the requirement that the General Assembly must appropriate the money which the delinquent locality fails to supply? The answer is that there is no such requirement. The Constitution is specific about what appropriation the General Assembly must make. Section 135 is devoted to that subject. In plain words it says what the General Assembly *shall* appropriate. It says that the General Assembly *shall* apply the "constitutional minimum" funds to the schools of the primary and grammar grades, and shall make such other appropriations for school purposes "as it may deem best". Clearly, the latter words are not the language of command. They are words of permission, to be exercised as the General Assembly may determine in its legislative function.

These words are similar in import to those used in Section 136, by which the localities are "authorized" to raise additional funds to be spent by the local school authorities in "establishing and maintaining such schools as in their judgment the public welfare may require."

Of these words, Chief Justice Eggleston, speaking for the court, said in *Griffin* v. *Board of Supervisors of Prince Edward County, supra,* 203 Va. 321, 327, 124 S.E. 2d 227, 232, that they imposed no mandatory duty on the Board of Supervisors to appropriate school funds, but constituted a grant of power and discretion.

Can it reasonably be said that the like language of Section 135, authorizing the General Assembly to make such other appropriation "as it may deem best," is not a grant of power and discretion, but a mandatory requirement that the General Assembly appropriate all funds necessary for the operation of schools if the localities fail to appropriate their part? It has never heretofore been so construed.

We repeat the statement in the *Griffin* case "that the exercise of the power of taxation is a legislative function." The appropriation of money raised by taxation is also a legislative function, specifically and distinctly made so by Section 135 of the Constitution with respect to appropriations for school purposes beyond the minimum sums named therein.

This court should not now undertake to direct the exercise of that legislative function so specifically granted to the General Assembly by the Constitution. Rather we should observe the command of that document in Section 5 that the legislative and judicial functions should not encroach upon each other but be kept apart.

It is not our belief that the interpretation of our State Constitution as made by us involves the denial of any right guaranteed to any citizen of Prince Edward county by the Constitution of the United States, or that a different interpretation is required in order to prevent the Federal courts from stepping in to enforce such supposed right.

EGGLESTON, C. J., dissenting.

The majority opinion holds *inter alia*: (1) There is no constitutional obligation on the General Assembly to relieve the closing of the public free schools in Prince Edward county; (2) the refusal of the local Board of Supervisors and the General Assembly to supply the necessary funds with which to maintain and operate the schools in Prince Edward county does not violate the rights of the citizens of that county guaranteed to them under the Fourteenth Amendment.

I disagree with both holdings.

As to the first point, I am firm in the view that the General Assembly is under the constitutional duty to relieve the closing of public free schools in Prince Edward county, a situation which has brought to this State the shameful distinction of having within its borders the only school district in this Nation where public free schools are not provided for its children.

The majority opinion argues at great length that under our Constitution it is not the duty of the General Assembly but that of the local school boards to *operate* public free schools. No one questions that. Nor until the situation in Prince Edward county arose did anyone question that the operation of public free schools is primarily a function of the State which establishes the machinery for such operation and that the local bodies are merely the agencies of the State in such operation. As we said in *Kellam* v. *School Board of City of Norfolk*, 202 Va. 252, 254, 117 S.E. 2d 96, 98, pursuant to the mandate of the Constitution, "the legislature has established school boards to act as agencies of the State in carrying out the obligations imposed."

However that may be, we are not here primarily concerned with whose duty it is to *operate* the schools. The question is whose duty it is to *maintain* and support them. It is everywhere held that the maintenance of public schools is a state governmental duty and not a local function. 47 Am. Jur., Schools, § 6, pp. 299, 300; 78 C.J.S., Schools and School Districts, § 17, p. 632.

As I see it, the specific issue in this case is whether, under the provisions of the Constitution of Virginia, it is the duty of the General Assembly to supply the necessary funds with which to operate public free schools in Prince Edward county where the local Board of Supervisors has refused to do so.

An affirmative answer to this question is found in the plain wording of § 129 of the Constitution which reads: "The General Assembly shall establish and maintain an efficient system of public free schools throughout the State." This section stands at the head of Article IX of the Constitution dealing with "Education and Public Instruction."

We have several times said that the section is mandatory and means just what it says. *Harrison* v. *Day*, 200 Va. 439, 450, 106 S.E. 2d 636, 645, and cases there cited.

The language of § 129 is plain and specific. It imposes on the General Assembly the duty to "establish" and the duty to "maintain" an efficient system of public free schools "throughout the State." To "maintain," as defined in Webster's New International Dictionary, 3d Ed., means among other things, to "support" and "bear the expense of." We accepted and

applied that definition in *Savage* v. *Commonwealth*, 186 Va. 1012, 1020, 45 S.E. 2d 313, 317.

But what is conclusive of the matter is our holding in *Harrison* v. *Day, supra*, that this section "requires the State to *'maintain* an efficient system of public free schools *throughout the State.'* [Emphasis by the court.] That means that the State must *support* such public free schools in the State as are necessary to an efficient system, * * *." [Emphasis added.] 200 Va., at page 450, 106 S.E. 2d, at page 646.

Webster's New International Dictionary, 3d Ed., defines "throughout" as meaning "in or to every part of." Accordingly, "throughout the State" means in every part of the State, which embraces every locality or school district in the State.

The majority opinion holds that under § 129 of the Constitution it is the obligation of the General Assembly to establish a "system of public free schools," that it has done so by setting up a system whereby the necessary funds are furnished partly by the State and partly by the local governing bodies, and that having done this, the General Assembly has discharged its full constitutional duty and is not concerned if a particular locality refuses to do its duty. While this may satisfy the requirement for the General Assembly to "establish" a system, it ignores its duty to "maintain" such system.

It is true that the Constitution contemplates that the funds for the operation of schools will be supplied partly by appropriations by the General Assembly (§§ 134, 135) and partly by appropriations by the local governing bodies (§ 136). In *Griffin* v. *Board of Supervisors of Prince Edward Co.*, 203 Va. 321, 327, 124 S.E. 2d 227, 232, we held that it is within the discretion of a local board of supervisors whether it

will supply its share of the necessary funds to operate a local school. But it does not follow that where such local governing body refuses to discharge its duty the General Assembly is under no constitutional duty to supply this deficiency.

Section 135 of the Constitution, after providing that the General Assembly shall apply "the annual interest on the literary fund" and a portion of the capitation tax to school purposes, directs that it "shall make such other appropriations for school purposes as it may deem best." But that section must be read in connection with § 129 which requires the General Assembly to "maintain" an efficient system of public free schools throughout the State. Thus, while under § 135 the General Assembly may appropriate such funds "as it may deem best," such appropriation may not fall below the requirements of § 129.

If, as the majority opinion holds, Prince Edward county may refuse to appropriate its share of the necessary funds for the operation of its public free schools without imposing any additional financial obligation on the General Assembly, then each county or city may do likewise. In short, by the refusal of the localities to bear their respective shares of the cost of operating their public free schools the whole system might collapse, and yet there would be no duty on the General Assembly to maintain these schools. How can this reasoning be squared with the requirement on the General Assembly to maintain an efficient system of public free schools "throughout the State?" How can there be an efficient system of public free schools without any such schools? How can there be an efficient system of public free schools "throughout the State" so long as there are no such schools in Prince Edward county?

Obviously, the General Assembly does not satisfy the requirement of § 129 to "maintain" an efficient system of public free schools "throughout the State" where it fails to supply the necessary funds in case the local governing bodies refuse to do so.

In my opinion, where a single local governing body defaults on its obligations to supply the necessary funds for the operation of its schools, it is not the duty of the General Assembly, under § 129 of the Constitution, to take over and operate such schools. But, in that event, and under that section, it becomes the duty of the General Assembly to appropriate, for the use of the local school board in that community, the necessary funds with which the latter may operate the schools there. This is quite in accord with the constitutional plan that the operation of such schools is the function of the local school boards.

The majority opinion holds that to do this might upset the present method of operating the public free schools, because, it says, every locality in the State might refuse, and indeed would be encouraged to refuse, to appropriate its share of the necessary funds, and that this would require the General Assembly to assume the entire obligation of furnishing the funds for the operation of such schools.

The obvious answer is that § 129 contemplates that the General Assembly shall assume this obligation rather than allow the public free schools to be closed in all localities, or even in a single locality. This would be in accord with what has been said is the well-recognized principle that the financial maintenance of public free schools is a state function.

As to the second point, in my opinion, the refusal of the Board of Supervisors and the General Assembly to supply the necessary funds for the maintenance of public free schools in Prince Edward

county, while such public free schools are maintained elsewhere throughout the State, clearly denies to the citizens of that county, both white and colored, the equal protection and privileges of the law guaranteed to them under the provisions of the Fourteenth Amendment.

The local boards of supervisors and the local school boards, as has been said, are mere agencies of the State in providing the local funds necessary for the maintenance and operation of the schools. Thus, in its final analysis, the default is a default of the State.

The majority opinion argues that we have many instances in which a particular locality or localities are granted local option privileges which are denied to other localities and that it is well settled that these local option privileges do not violate the equal protection provisions of the Fourteenth Amendment. But to my mind we may not equate the constitutional right to an education in the public free schools in the State with such local option privileges. One is a necessity guaranteed to the citizens in the performance of a governmental function; the others are mere privileges which the State may grant or refuse at its pleasure.

The refusal of the highest court of this State to recognize here the rights of the citizens of Prince Edward county, guaranteed to them under the Constitution of the United States, is a clear invitation to the federal courts to step in and enforce such rights. I am sure that that invitation will be promptly accepted. We shall see!

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SUPREME COURT, U. S.

No. 592

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

COCHEYSE J. GRIFFIN, ET AL., *Petitioners*

v.

COUNTY SCHOOL BOARD OF PRINCE EDWARDS COUNTY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE AND MEMORANDUM FOR THE NATIONAL EDUCATION ASSOCIATION AS AMICUS CURIAE

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County School Board of Prince Edwards County, Et Al.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE MEMORANDUM AMICUS CURIAE

The National Education Association of the United States respectfully moves for leave to file the annexed Memorandum Amicus Curiae.

Petitioners have consented to the filing of this Memorandum, as reflected in a letter filed with the Clerk. Respondents have not.

The National Education Association of the United States was chartered by Congress in 1906. With approximately 900,000 members and more than 8,000 local and state affiliates, the National Education Association is the voice of the teaching profession in America. For over half a century the National Education Association's purpose has been to improve public education in the United States. At its last annual convention, the membership passed a resolution which placed the National Education Association on record

as being "vigorously opposed" to "any movement which would diminish" "the priceless heritage of free public educational opportunity for every American."

The legal issue presented by this case must be decided in a broader context which gives consideration to the nature of universal free education in America. Because of movant's long history in and intimate contact with American education, it believes that it is peculiarily fitted to bring before the Court some of these historical and philosophical considerations, all as more fully detailed in the annexed Memorandum. These materials were not contained in the briefs below or in the certiorari papers and we understand that they will not be included in the briefs on the merits by the parties.

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MEMORANDUM FOR THE NATIONAL EDUCATION ASSOCIATION AS AMICUS CURIAE

The importance of free public education and its development as an American institution must obviously be given full consideration and great weight by the Court in determining whether petitioners are entitled to the relief they seek.[1]

Universal free education is so deeply imbedded in the American heritage that it is by now almost axiomatic. In earlier days, however, universal free education was an achievement eagerly sought and dearly won. This case might well serve to remind us that our public education system, now too often taken for granted, is a necessary foundation stone of democratic government, as it is of individual fulfillment. Moreover, those who are left without the instruction which our society commonly provides are deprived of the opportunity to lead a useful, purposeful life within the American social structure.

This is increasingly true in today's world in which education is necessary not only to insure an individual's ability to participate in the responsibilities of citizenship, but also to achieve his minimal social and economic status and even to function as a wage earner. Present-day society is marked by an explosion of knowledge, particularly in terms of science and technology. The uneducated individual is defenseless; he becomes a charge upon society. Only through universal opportunity for education can the society and the individual be assured of the essential ingredients of national prosperity and individual well-being.

Benjamin Franklin put the matter this way:

> The good Education of Youth has been esteemed by wise Men in all Ages, as the surest Foundation of the

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[1] *Cf. Brown* v. *Board of Education*, 347 U.S. 483, 493-4 (1954).

> Happiness both of private Families and of Commonwealths. . . . Capacities require Cultivation, it being truly with them, as with the best Ground, which unless well tilled and sowed with profitable Seed, produces only ranker Weeds.
>
> . . . an Ability to serve Mankind, one's Country, Friends and Family . . . is (with the Blessing of God) to be acquir'd or greatly encreas'd by true Learning; and should indeed be the great Aim and End of all Learning.[2]

In the words of a former Justice of this Court, James Wilson:

> . . . [T]he fate of states depends on the education of youth.[3]

Thomas Jefferson regarded free public education as the only "sure foundation [that] can be devised for the preservation of freedom and happiness".[4] Jefferson's concern was not abstract or transient; it was one of the abiding and practical interests of his life. In 1810, he wrote to Governor Tyler of Virginia:

> I have indeed two great measures at heart, without which no republic can maintain itself in strength. (1) That of general education, to enable every man to judge for himself what will secure or endanger his freedom, (2) to divide every county into hundreds, of such size that all the children of each will be within reach of a central school in it.[5]

This twofold aspect of education—as the foundation of

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[2] Benjamin Franklin, "Proposals Relating To The Education of Youth In Pensilvania" (1749), 2 The Writings of Benjamin Franklin (Smyth ed.) 388, 396.

[3] II The Works of James Wilson (Andrews ed.) 102.

[4] IV The Writings of Thomas Jefferson (Ford ed.) 268-269.

[5] IX The Writings of Thomas Jefferson (Ford ed.) 276-277, *Cf.* IX The Works of John Adams (Adams ed.) 540:

> There should not be a district of one mile square without a school in it, not founded by a charitable individual, but maintained at the expense of the people themselves. [Letter to John Jebb, London, Sept. 10, 1785]

individual happiness and the success of governments—was thus summarized by Woodrow Wilson:

> Popular education is necessary for the preservation of those conditions of freedom, political and social, which are indispensable to free individual development. . . . Without popular education, moreover, no government which rests upon popular action can long endure: the people must be schooled in the knowledge, and if possible in the virtues, upon which the maintenance and success of free institutions depend."[6]

Carrying the banner which that earlier Virginian, Thomas Jefferson had borne before him, Robert E. Lee wrote after the War between the States:

> The thorough education of all classes of the people is the most efficacious means, in my opinion, of promoting the prosperity of the South. The material interests of its citizens, as well as their moral and intellectual culture, depend upon its accomplishment.[7]

That pioneer in American educational history, Horace Mann, urged that "every human being" has an "absolute right . . . to an education", and that there is a "correlative duty of every government to see that the means of that education are provided for all."[8] As a nation, we are still committed to this proposition.[9]

The concept of free universal education in America had its roots in the same ferment which resulted in the Revolution of 1776. An essential element of the Founding Fathers' creed was that the foundation of the new system of self government must be an educated citizenry. Washington, in his farewell address, stated: "Promote, then as an object of primary importance, institutions for the general

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[6] Woodrow Wilson, The State (rev. ed., 1898) 638-639.

[7] Lee, *Recollections & Letters of General Robert E. Lee.* 211.

[8] Mann, Tenth Annual Report on Education Covering the Year 1846 (Massachusetts Board of Education) 112.

[9] See John W. Gardner, "National Goals in Education," submitted to the President's Commission on National Goals and published with its report, *Goals for America*, 81.

diffusion of knowledge. In proportion as the structure of a government gives force to public opinion it is essential that public opinion should be enlightened."[10] In 1779 a bill was introduced in the Virginia Legislature, drafted by Jefferson and Wythe, which was designed to establish a state public school system supported by taxes levied upon the public.[11] Jefferson considered this provision as "the most important bill in our whole Code."[12]

Thus the ideal was clearly set before the people early in our history. By the middle 1800's, the free public school movement had achieved sustained success. Massachusetts passed a general state school law in 1789 and achieved a true public school system in the 1830's.[13] By the 1850's Delaware, Vermont and Ohio had established state school systems. Pennsylvania was prevented from doing so only by a few counties which had not taken advantage of the optional provisions of that state's school law. In the 1860's California, Indiana, Michigan, New York, Connecticut and Rhode Island joined the growing number of states with their own public school systems.[14]

The adoption of a system of free public schools in the South was delayed somewhat by the alternative, and not wholly unsatisfactory, system of plantation schools. The development of a universal free educational opportunity also was hampered by the lack of a substantial middle class in the predominantly agricultural economy and by the tensions presaging the War between the States.[15] The

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[10] Washington's Farewell Address (Troy, 1812) 24. See generally, *The Unique Function of Education in American Democracy*, Educational Policies Commission of the NEA.

[11] Monroe, V Cyclopedia of Education 728; Cremin, *The American Common School, An Historical Conception*, 110.

[12] IV Writings of Thomas Jefferson (Ford ed.) 268-269.

[13] Cremin, *The American Common School, An Historical Conception* 87, 94.

[14] Good, *A History of American Education* 154; and see, generally, Cremin, *op. cit. supra.*

[15] See, generally, Cremin, *op. cit. supra.*

destruction and chaos which thereafter ensued served further to impair the ability of Southern states to provide public education for all. However, by 1876, Virginia as had most other Southern states, had made substantial progress toward the establishment of a truly free and universal public school system.[16]

By the turn of the century, over a hundred years of effort had succeeded in assuring the opportunity for a free public education for virtually every American child. Educational effort since that time has been directed toward the improvement and expansion of the scope and content of the education offered by the free public school system.

Since the establishment of universal free public education in the latter part of the nineteenth century, the concept has become so much a part of the American way of life that until the instant case, when respondents exercised what they deem to be their right to depart from it, adherence to this ideal was unanimous and unquestioned. The right to a free public education had become the unspoken assumption of all American parents and was transmitted by them even to their pre-school children. This was not something people debated and argued about; it was the assumed basis on which Americans planned their lives. Every legitimate expectation supported such an assumption. Here was a principle deeply imbedded in the American faith, universally adhered to for over half a century, recognized as an essential ingredient of meaningful democratic government, and as a necessary requisite to a useful and fulfilling life within the American social structure. To the extent that these legitimate expectations can be the basis of a right which this Court will recognize, petitioners are entitled to the opportunity of a free public education. The survival of democracy requires that every

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[16] Monroe, V Cyclopedia of Education 729.

state maintain a system of free public education and safeguard the education of all. The public school system is not expendable.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1963

No. 592

COCHEYSE J. GRIFFIN, ETC, *et al.*,
Petitioners,

v.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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BRIEF FOR PETITIONERS

Opinions Below

The opinion of the United States Court of Appeals for the Fourth Circuit, reported at 322 F. 2d 332, is printed at pages 209-236 of the record. The opinions of the district court, reported sub nom. *Allen* v. *County School Board of Prince Edward County* at 198 F. Supp. 497 and 207 F. Supp. 349, are printed at pages 52-65, and at pages 70-81 of the record. The opinion of the Supreme Court of Appeals of Virginia, reported sub nom. *County School Board of Prince Edward County* v. *Griffin* at — Va. —, 133 S. E. 2d 565, is set forth in full as an appendix to the memorandum of the United States filed in December, 1963, urging that the petition for the writ of certiorari be granted in this case.

Jurisdiction

Jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1254(1). The decree of the court of appeals was entered on August 12, 1963 by a divided court in reliance upon the doctrine of federal abstention (R. 237). Application was made to this Court for a stay pending the filing and disposition of the petition for writ of certiorari (R. 238). That application was granted on September 30, 1963, in an order signed by Mr. Justice Brennan.

On December 2, 1963, the Supreme Court of Appeals of Virginia rendered an authoritative determination of the meaning of Virginia's constitutional and statutory provisions requiring the establishment and maintenance of an efficient system of free public schools, as these provisions relate to respondents, leaving no vestige of the doctrine of federal abstention in the way of a final adjudication of petitioners' federal rights and of respondents' Fourteenth Amendment obligations.[1] This Court granted the petition for writ of certiorari on January 6, 1964, without awaiting further adjudication in the courts below, and the cause is here for final determination on the merits.

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[1] While the doctrine of federal abstention is no longer at issue in this cause, its meaning, import and application have been, petitioners respectfully submit, grossly misunderstood and misconceived by both the district court and the court of appeals. Petitioners have urged that the instant case was not appropriate for application of the doctrine and place reliance on McNeese v. Board of Education, 373 U. S. 668; Allegheny County v. Frank Mashuda Co., 360 U. S. 185; Government and Civic Employees Organizing Committee v. Windsor, 353 U. S. 364. Moreover, once relegated to the state courts, a litigant, petitioners have contended, need press for determination of the state law questions only, preserving his right, after such adjudication, to return to the federal courts for final determination of his federal claims. England v. Louisiana State Board of Medical Examiners, — U. S. — , 32 L.W. 4093, decided January 13, 1964. Cf. NAACP v. Button, 371 U. S. 415.

Questions Presented

1. Whether the refusal of the board of supervisors to levy taxes and appropriate funds to enable the county school board to operate and maintain public schools in Prince Edward County, being admittedly a device to avoid maintaining and supporting public schools free of racial discrimination as required by the federal constitution and by the decisions and mandates of the courts below, constitutes a denial of the Fourteenth Amendment's guarantees of equal protection and due process of law?

2. Whether the failure of the board of supervisors to levy taxes and appropriate funds for the maintenance and operation of public schools in Prince Edward County, as it is empowered to do under the constitution and statutes of Virginia, constitutes a violation of the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States, in the light of the fact that a publicly supported school system is functioning in all other parts of the state?

3. Does the failure of the state board of education, superintendent of public instruction, the county school board and board of supervisors to keep public schools open in Prince Edward County, while a public school system is maintained, operated and supported throughout the state, constitute a denial of petitioners' rights to equal protection and due process of law under the Fourteenth Amendment to the Constitution of the United States?

4. Are federal constitutional rights violated when tax credits, tuition grants or other public funds are used, either for the direct or indirect support of any public or private school which practices racial discrimination, or to frustrate and defeat the declared rights of Negro children to unsegregated public education?

Statement

1. Summary History of the Litigation

This suit was instituted in the district court in 1951 by Dorothy Davis and some hundred other minor plaintiffs.[2] It was argued here along with the other school segregation cases, was decided on the merits in *Brown* v. *Board of Education*, 347 U. S. 483, and was remanded to the district court in a subsequent decision for implementation of petitioners' constitutional rights with all deliberate speed, 349 U. S. 294. Since that time, there have been five decisions by the district court [142 F. Supp. 616 (1956); 149 F. Supp. 431 (1957); 164 F. Supp. 786 (1958); 198 F. Supp. 497 (1961); 207 F. Supp. 349 (1962)] and three decisions by the court of appeals [249 F. 2d 462 (1957); 266 F. 2d 507 (1959); 322 F. 2d 332 (1963)]. In addition, the Supreme Court of Appeals of Virginia has rendered two decisions in this controversy, *sub nom. Griffin* v. *Board of Supervisors*, 203 Va. 321, 124 S. E. 2d 227 (1962); and *County School Board* v. *Griffin*, — Va. — , 133 S. E. 2d 565 (1963). Despite the prolixity of judicial pronouncements in ten long years of litigation, Dorothy Davis and an entire generation of Negro children of public school age have forever lost their constitutional rights to a public school education unimpaired by the burden of racial discrimination.[3] Standing in the place of their predecessors are the present petitioners who seek and hope to enjoy, as their forerunners were unable

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[2] The proceedings commenced as Davis v. County School Board of Prince Edward County, 103 F. Supp. 337 (ED. Va. 1952) against the county school board and division superintendent. The commonwealth moved to intervene as a party-defendant, and pursuant thereto, an order was entered on September 14, 1951, making it a party to these proceedings. See Davis v. County School Board (No. 191, October Term, 1952, R. 36-37). After decision by this Court, the state no longer actively participated in this cause.

[3] In 1958, Eva Allen and others intervened and continued these proceedings. See (164 F. Supp. 786). The appeal to the court of appeals, see (322 F. 2d 332), and to this Court is being pursued by a third set of complainants.

to do, equal educational opportunities in the public schools of Prince Edward County, as commanded by the Constitution of the United States.

2. The Basic and Uncontroverted Facts

The facts pertinent to adjudication of this cause are not in dispute. On May 3, 1956, the respondent board of supervisors adopted a resolution (R. 50) declaring it to be its policy and intention that:

> . . . no tax levy shall be made upon the said people nor public revenue derived from local taxes shall be appropriated for the operation and maintenance of public schools in said county wherein white and colored children are taught together under any plan or arrangement whatsoever.

On May 5, 1959, the court of appeals ordered the desegregation of the public schools in Prince Edward County to commence in September, 1959 (266 F. 2d 507). On June 3, 1959, the respondent board of supervisors met and refused to approve a budget for the operation of the public schools in the county for the 1959-60 school term and authorized the issuance of a public statement as follows:

> The action taken today by the Board of Supervisors of Prince Edward County has been determined upon only after the most careful and deliberate study over the long period of years since the schools of this county were first brought under the force of Federal Court decree. It is with the most profound regret that we have been compelled to take this action. We do not act in defiance of any law or of any court. Above all we do not act with hostility toward the negro people of Prince Edward County. (sic)
>
> On the contrary, it is the fervent hope of this Board that the friendly and peaceful relations between the white and negro people of this county will not be further impaired (sic) and that we may in due time be able to resume the operation of public schools in this county upon a basis acceptable to all the people of this county.

> The School Board of this county is confronted with a court decree which requires the admission of white and colored children to all the schools of the county without regard to race or color. Knowing the people of this county as we do, we know that it is not possible to operate the schools of this county within the terms of that prineiple and, at the same time, maintain an atmosphere conducive to the educational benefit of our people.
>
> We are also deeply concerned that we should not bring about conditions which would most certainly result in further racial tension and which might result in violence of a nature which would be deeply deplored by all of our people and would destroy all hope of restoring the peaceful and happy relations of the races in this county.
>
> Our action is in accord with the will of the people of the county repeatedly expressed during the past five years and is in promotion of the peace and good order and the general welfare of all the people of Prince Edward County.[4]

Since the date that announcement was made, no public schools have been in operation, and approximately 1800 Negro children have been without a public school education in Prince Edward County (R. 55, 73).

In September, 1959, the Prince Edward School Foundation opened a private, nonsectarian elementary and secondary educational institution for white children (R. 58). During the first year of operation, no tuition was charged, approximately 1,300 white children were enrolled (R. 58), and practically all the white public school teachers in the county were employed as teachers in the schools of the Foundation (R. 59). The Foundation's secondary school was accredited by the state board of education in 1961 (R. 60). For the 1960-61 school term, however, a tuition of $240 per year was established for the

[4] This statement was filed in the Supervisors' Record Book 9 at page 65.

elementary grades and $265 per year for the secondary grades. 1,327 white children enrolled in these schools, and for each high school student and for each elementary school student, state and county tuition grants of $250.00 and $225.00, respectively, were made available (R. 59, 195).[5]

Approximately $130,000 was paid out of the county treasury for the education of white children in the Foundation schools during the 1960-61 school term (R. 62, 189). In addition, $56,000 was allowed in the form of tax credits for contributions made to this institution.[6]

Training centers were set up for the Negro children in 1959. Since no systematic formalized education was offered, however, these centers were not eligible for support under the state or county tuition grant program. They were operated principally for morale purposes, and about one-third of the Negro children of public school age attended (R. 60), leaving the overwhelming majority without any semblance of education whatsoever. On the initiative of the United States, formal educational opportunities are now being made available to these children in the county for the first time since the end of the 1958-1959 school term.

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[5] These grants were made pursuant to Section 22-115.30, Code of Virginia, 1950 (1962 Cum. Supp.) providing for state subsidies and Sections 22-115.31–22-115.36 authorizing local scholarship aid. In accord with the state law, the board of supervisors on July 18, 1960, enacted an ordinance permitting tuition grants of at least $100 per child for education at a private "nonsectarian school located within the County of Prince Edward or in public schools located within the State * * *" (R. 108-111).

[6] On July 18, 1960, the county adopted an ordinance providing for tax credits not to exceed 25% of the total county real and personal property taxes for contributions made to private, nonprofit, nonsecretarian schools located within the county (R. 111-114).

3. Decisions of the Courts Below

On May 5, 1959, the court of appeals ordered desegregation of the public schools to commence in September, 1959 (266 F. 2d 507). The following month the board of supervisors refused to provide funds for the continued operation of the public schools. The district court's order on the mandate of the court of appeals was not entered, however, until April 22, 1960 (R. 18), approximately eleven months after the board of supervisors had publicly announced its refusal to finance public schools in the county.

Petitioners filed a supplemental and an amended supplemental complaint, adding the county board of supervisors, the county treasurer, the state board of education and the state superintendent of public instruction as defendants and requesting that they be enjoined from refusing to maintain and operate public schools in Prince Edward County, from expending public funds for the support of any private schools or in reimbursement of money paid for attendance at any private school that excludes petitioners by reason of race, and such further and additional relief as the court deemed justifiable (R. 2-5, 20-27). A trial on the merits was had in the district court, July 24-27, 1961, inclusive (R. 8-9).

On August 23, 1961, the district court filed the first of its memorandum opinions (R. 52), in which it held that the schools in the county had been closed to avoid compliance with court ordered desegregation; and that public monies were being used for the support and maintenance of elementary and secondary schools for white children, operated by the Prince Edward School Foundation. In its decree entered on November 16 (R. 66), the court enjoined the use of tuition grants and tax credits for the support and maintenance of private, nonsectarian schools in Prince Edward County for so long as the public schools remained closed (R. 66). The court refused to decide whether public schools could be abandoned in order to avoid compliance

with the law of the land. To answer that question, interpretation of Virginia's constitution and statutes was considered necessary. The court, therefore, invoked the doctrine of federal abstention, withholding judgment pending final determination by the state courts (R. 58).

Petitioners pursuant to the court's suggestion, instituted mandamus proceedings in the Supreme Court of Appeals of Virginia to determine whether the state constitution and/or laws placed a mandatory duty on the respondent board of supervisors to levy taxes and appropriate funds for the maintenance and operation of public schools in Prince Edward County. The court held that mandamus would not lie to compel the board of supervisors to provide funds for public schools.[7]

Thereupon, invoking their right to pursue their federal claims in the federal courts, *England* v. *Louisiana State Board of Medical Examiners*, — U. S. —, 32 L. W. 4093, January 13, 1964, petitioners, on March 26, 1962, filed a motion for further relief in the district court (R. 123). After hearing, that court on July 25, 1962, ruled that the federal constitution forbade operation of a statewide system of public schools, while the public schools in Prince Edward County remained closed (R. 70-81). It directed the county school board to present by September 7, 1962, plans for the admission of pupils in the public elementary and secondary schools without regard to race or color for the 1962-1963 school term. Assuming that respondents would voluntarily comply, the court declined to afford injunctive relief (R. 80). At the September, 1962, hearing, no plans were submitted, and it was clear that the schools would not be reopened except under legal compulsion.

In October, 1962, the district court issued an order (R. 83-87) setting forth its findings that the schools had been closed to avoid operating them without racial discrimina-

[7] See Griffin v. Board of Supervisors of Prince Edward County, 203 Va. 321, 124 S. E. 2d 227 (1962), printed in the record at pages 99-108.

tion; that they had been closed for three years and would remain closed unless required by law to be reopened; that practically all the Negro children had been denied formal education and that white children had been educated in private schools; that all other children in the state were granted the privilege of being educated in public schools at public expense; that the state constitution of Virginia mandated the maintenance of an efficient system of public schools throughout the state, and contemplated that monies for such schools should be secured, in part, from the General Assembly and, in part, from local sources; that the state board of education, superintendent of public instruction, division superintendents and local school boards were responsible for establishing, maintaining and operating a statewide public school system; that public schools had been established and were being maintained, supported and administered in accordance with state law, primarily on a statewide basis; that a large percentage of the schools' operating funds came from state sources; that textbooks, curriculum, minimum teachers' salaries and many other school procedures were governed by state law; and that responsible school officials could not abdicate their responsibilities by ignoring them or failing to discharge them.

It decreed that the public schools in Prince Edward County could not be closed to avoid compliance with the requirements of the Fourteenth Amendment, while the state permitted other public schools to remain open at the taxpayer's expense. Entry of an order of compliance was deferred, however, pending review by the court of appeals and this Court (R. 87).

Appeals and cross-appeals were filed (R. 88,114). The cause was argued in the court of appeals on January 9, 1963. On August 12, 1963, that court, one judge dissenting, vacated and remanded the judgments of the district court until a final and authoritative determination of the state law questions had been obtained from the state courts. The instant petition was filed to review this judgment and the merits of the cause.

Meanwhile, in a suit instituted in the state courts by respondents, the Supreme Court of Appeals of Virginia, on December 2, 1963, ruled (133 S. E. 2d 565) that the board of supervisors could not be compelled under state law to appropriate funds for the operation of schools in the county; that the state constitution's requirement that the General Assembly establish and maintain a statewide public school system was met when the state had established a system under which public schools could be maintained and operated with local support; that the state board of education and state superintendent of public instruction have no power or duty to operate public schools apart from the will of the people expressed by local governing bodies; and that tuition grants were allowable to private nonsectarian schools under state law without regard to whether public schools are in operation.

Summary of Argument

The Commonwealth of Virginia is deeply involved in the maintenance and operation of a statewide public school system. Pursuant to a formula established under the state constitution and statutes, public education is being provided throughout Virginia except in Prince Edward County.

The highest court of the state has ruled that the respondent board of supervisors cannot be compelled to provide funds for the operation of schools within the county; that in the absence of such local funds being made available by the board of supervisors, the other respondents are under no constitutional mandate to operate public schools in Prince Edward County; and that without regard to the presence or absence of public education, state tuition grants may be made available under the state's scholarship program. While this must be accepted as an authoritative determination of the state law, it is not a final

settlement of respondents' Fourteenth Amendment duties and obligations.

There is no question but that the board of supervisors has refused to provide funds for the operation of schools in Prince Edward County in order to avoid court compulsion to desegregate the schools, and to defeat the declared rights of petitioners to equal educational opportunities. *Cooper* v. *Aaron*, 358 U. S. 1, made clear that such action is not permissible under the Constitution of the United States; and that respondents may be constrained to provide the necessary funds for the operation of the public school system in Prince Edward County on an unsegregated basis has been made equally manifest. See *James* v. *Duckworth*, 170 F. Supp. 342 (E. D. Va. 1959), aff'd, 267 F. 2d 224 (4th Cir. 1959) cert. denied, 361 U. S. 835; Cf. *James* v. *Almond*, 170 F. Supp. 331 (E. D. Va. 1959), appeal dismissed, 359 U. S. 1006.

As long as the state is supporting, maintaining or operating public schools in the State of Virginia, the equal protection and due process clauses of the Fourteenth Amendment require that the public schools in Prince Edward County remain open and available to petitioners and all other qualified persons without discrimintion. *James* v. *Almond, supra; Hall* v. *St. Helena Parish School Board*, 197 F. Supp. 649 (E. D. La. 1961), aff'd, 368 U. S. 515; *Aaron* v. *McKinley*, 173 F. Supp. 944 (E. D. Ark. 1959), aff'd, *sub nom. Faubus* v. *Aaron*, 361 U. S. 197. The state may not through any arrangement, device or scheme of any kind, including, petitioners respectfully submit, purported abandonment of public schools, tuition grants and tax credits, evade, frustrate or defeat the constitutional rights of petitioners to access to public education unburdened by racial restrictions. *Cooper* v. *Aaron, supra; Aaron* v. *Cooper*, 261 F. 2d 97 (8th Cir. 1958).

Thus, it is not enough that tuition grants and tax credits, shown in this record to be utilized for the support of segregated "private, nonsectarian schools" operated by the

Prince Edward Foundation, should be barred for only as long as public schools in Prince Edward County remain closed. Under no circumstances can public funds be used as a device to perpetuate separate schools for white and Negro children, and, petitioners respectfully submit, a broad injunction prohibiting such use is both warranted and needed in this case.

Tuition grants, while not unconstitutional per se, become so when used to effectuate an illegal or unlawful end, see *Gomillion* v. *Lightfoot*, 364 U. S. 339, and public funds cannot be employed for the support and maintenance of any institution that practices racial discrimination.

Public education is a vital governmental function. In Prince Edward County, there has been an unconscionable experimentation with ignorance. Here, no abstract question of the duty of the state to provide a public education to all its citizens need be decided; nor must the court deal with the power of a state to abandon public schools altogether. While petitioners contend that it is a function of government to provide public educational facilities—a function of critical importance to the perdurance of democratic institutions, see *Brown* v. *Board of Education, supra*—and that state abandonment of this assumed obligation raises serious questions of substantive due process, it is clear that Virginia has not withdrawn from the field of public education. Thus, unquestioned, rather than debatable, issues of due process and equal protection are present in this case.

The fact that the Board of Supervisors of Prince Edward County has refused to authorize any public education in that county does not dispose of these issues. The difference between a locally assumed obligation to provide various forms of public recreational facilities and the state's assumed obligation to provide a statewide public school system with local support, requires no extended discussion. In the one instance, the obligation is totally local in nature,

and in the other, it is a method for effectuating a statewide program controlled, managed and supervised by the state. And while it might be argued, insofar as local recreational facilities are concerned, that the abandonment of such facilities to avoid compliance with a court decree is not constitutionally actionable, even though other localities in the state continue to provide recreational facilities, see *Tonkins* v. *City of Greensboro*, 276 F. 2d 890 (4th Cir. 1960); *City of Montgomery, Alabama* v. *Gilmore*, 277 F. 2d 364 (5th Cir. 1960), it cannot be said here that there has been such a total abandonment of the statewide program of public education, by virtue of the closure of public schools in Prince Edward County, as to insulate respondents' action from the impact of the Fourteenth Amendment. See *James* v. *Almond, supra; Hall* v. *St. Helena Parish School Board, supra.*

In any event, respondents are guilty of attempting to defeat and frustrate petitioners' right to unsegregated education, *Cooper* v. *Aaron, supra; Hall* v. *St. Helena Parish School Board, supra; Bush* v. *Orleans Parish School Board*, 190 F. Supp. 861 (E. D. La. 1961), aff'd, 365 U. S. 569; of discriminating against them and other students in Prince Edward County on a geographical basis, *Gomillion* v. *Lightfoot, supra; Baker* v. *Carr*, 369 U. S. 186; *Wesberry* v. *Sanders*, — U. S. —, 32 L. W. 4142, Feb. 17, 1964; and of unlawfully using the state and local scholarship programs as a device to maintain and continue a public segregated school system in the county. *Cooper* v. *Aaron, supra; James* v. *Almond, supra.* On any and all of these grounds, it is inconceivable that the federal courts are powerless to secure petitioners' personal and present rights and the Constitution's "warrants for the here and the now" *Watson* v. *Memphis*, 373 U. S. 526, 533.

ARGUMENT

I.

A Statewide System of Public Education is Being Maintained and Operated Throughout the Commonwealth of Virginia Pursuant to the Constitution and Statutes of Virginia.

As early as 1867, the Virginia Constitution provided for a statewide system of free public schools,[8] and upon its restoration to the Union in 1870, the Commonwealth pledged that "the constitution of Virginia shall never be so amended or changed so as to deprive any citizen or class of citizens of the United States, of the school rights and privileges secured by the Constitution of said state."[9]

In the Constitution of Virginia of 1902, the present Article IX was adopted, providing for the establishment and maintenance of an "efficient system of public free schools throughout the State," for its administration and control through various state officers, and for its support by appropriations from state and local sources. Title 22, enacted pursuant to constitutional command, is a series of regulations concerning the state board of education, state

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[8] Sec. 3. The general assembly shall provide by law, at its first session under this constitution, a uniform system of public free schools, and for its gradual, equal, and full introduction into all the counties of the state by the year eighteen hundred and seventy-six, or as much earlier as practicable.

Sec. 4. The general assembly shall have power, after a full introduction of the public free school system, to make such laws as shall not permit parents and guardians to allow their children to grow up in ignorance and vagrancy.

* * *

Sec. 11. Each city and county shall be held accountable for the destruction of school property that may take place within its limits by incendiaries or open violence.

[9] 16 Stat. 62, 63, 41st Cong., 2d Sess. (1870).

superintendent of public instruction, division superintendents, local school boards, state and local school taxes, teacher qualifications and certification, curriculum, school buildings, compulsory school attendance, and other aspects of a statewide system of public education.[10]

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[10] Title 22, Code of Virginia, 1950 (1962 Cum. Supp.).

Sec. 22-1 requires the maintenance of an efficient system of public free schools in all cities and counties; Sec. 22-2 places administration of the public school system in the hands of a state board of education, state superintendent of public instruction, division superintendents and local school boards; Sec. 22-5 empowers and required a minimum term of 180 days in each school district (at 1956 Extra Session, c. 66, this provision was amended to delete *required*). Sec. 22-21 authorizes and requires the state board "to do all things necessary to stimulate and encourage * * * activities and interest in the improvement of the elementary and secondary schools." Sec. 22-31, et seq., provides minimum standards for division superintendents to be established by the state board, fixes their duties, provides that part of the salary of division superintendent is paid by the state, and empowers the state board to punish for neglect of duties; Sec. 22-45, et seq., prescribes duties of local school boards; Sec. 22-101 provides that interest from literary fund should be retained for exclusive support and maintenance of public school system; Sec. 22-125, permitting 20% of the qualified voters to petition for an election when the board of supervisors refused to make a levy requested by the school board, to determine whether a levy in lieu of that authorized should be made was repealed by Acts of 1956, Ex. Sess. C. 79, Sec. 3; Sec. 22-126 providing that school tax should be not less than 50 cents and not more than $300 per hundred dollars of the assessed value of property was amended by Acts of 1956, Extra Sess. C. 67 by deleting *not less than 50 cents*; Sec. 22-191 empowers the state board to prescribe rules and regulations for the conduct of high schools, requirements for admission, and conditions upon which pupils may attend such schools. Sec. 22-202 provides for state board examination and certification of teachers (Sec. 22-204), and local boards, subject to some exceptions, may employ only teachers so certified. Secs. 22-233 to 22-240 prescribes subjects to be taught. Before 1959, Secs. 22-251–22-275 made attendance at school compulsory. In 1959, Ex. Sess., C. 2, these provisions were repealed and recodified in Sec. 22-275.1, et seq., the burden of which was to leave compulsory school attendance requirements to each county and city.

This Court's decision in *Brown* v. *Board of Education*, *supra*, invalidated the state constitutional provision (Article IX, Sec. 140) requiring the separation of the races in the public schools. On August 30, 1954, the Governor of Virginia appointed the Gray Commission on Public Education and directed it to study the effect of the *Brown* decision and to make whatever recommendations it might deem appropriate. In 1955, the Supreme Court of Appeals of Virginia in *Almond* v. *Day*, 197 Va. 419, 89 S. E. 2d 851, construed Sec. 141, Article IX of the Virginia Constitution as prohibiting the diversion of public funds from public schools to nonsectarian private schools. Thus, with the *Brown* and *Day* decisions, it became evident that revisions in the constitution and statutes of the state would be necessary, if there was to be any hope of preserving a segregated public school system.

The Gray Commission's final report was submitted on November 11, 1955. In general, it concluded that separate facilities in the public schools were in the best interest of all the people and that compulsory integration should be resisted. It recommended the calling of a special session of the General Assembly to authorize a constitutional convention to amend Section 141 of the constitution to provide for the payment of tuition grants and other expenses to students who might not desire to attend desegregated public schools.[11] It recommended legislation giving school officials broad discretion in assigning children to the public

[11] At this time, Virginia's regular scholarship or tuition grant program consisted of (1) college and university scholarships (including nursing scholarships) which were and are the subject of Chapter 4 of Title 23 (Secs. 23-31–23-38) of the Code of Virginia, 1950, as amended; and (2) aid to persons denied admission, that being the subject of Chapter 2 of Title 23 (Secs. 23.10–23-13), the chief purpose of which is to provide funds by which Negroes denied admission to state institutions of higher learning may receive funds in aid of their education out of the state.

schools and providing for state tuition grants to enable children being required to attend schools with children of another race to enroll in private segregated schools.

The recommended constitutional convention convened and amended Sec. 141 to permit public funds to be expended for education at private nonsectarian institutions. On August 27, 1956, the General Assembly met in Extra Session, and enacted legislation classified as "massive resistance", designed to prevent the expenditure of public funds for support of schools under compulsory desegregation and to permit the closing of schools desegregated or threatened with desegregation. Title 22 was amended in keeping with this purpose.[12]

In January, 1959, "massive resistance" came to an end with the decision in *Harrison* v. *Day*, 200 Va. 439, 106 SE 2d 636 (1959),[13] and resort was then had to tuition grants and local option programs to insure the continuation of segregated schools in those areas where it was deemed desirable. In the *Harrison* case, the Supreme Court of Appeals held the state was required to support and maintain free schools in which Negro and white children were educated together; that state funds could not be diverted from public schools to the use of children attending private schools; and that Sec. 141, as amended, permitted state tuition grants for attendance at private schools, but not at the public schools' expense. Subsequently, the present

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[12] For a discussion of the events and background of this period, the purpose and intent of massive resistance, see Adkins v. School Board of the City of Newport News, 148 F. Supp. 430, 434-439 (E. D. Va. 1957); NAACP v. Patty, 159 F. Supp. 503, 511-515 (E. D. Va. 1959).

[13] James v. Almond, 170 F. Supp. 331 (E. D. Va. 1959) is also important to this discussion, since it struck down the "massive resistance" statutes enabling the Governor to close schools threatened or required by court order to desegregate. But since it is an intepretation of federal law, it will be discussed more fully, infra.

state and local tuition grant programs were put into effect.[14]

In *Griffin* v. *Board of Supervisors of Prince Edward County, supra,* the Supreme Court of Appeals ruled that the constitution placed no mandatory duty on local boards of supervisors to levy taxes and appropriate money for the support of county free public schools. In *County School Board of Prince Edward Co.* v. *Griffin, supra,* the Supreme Court of Appeals ruled that the General Assembly's mandatory constitutional obligation to establish and maintain an efficient statewide system of free public schools did not require it to operate any schools; and that its obligation was met by setting up a system whereby public schools can be established and maintained with local support. The court also held that the respondent board of supervisors could not be required to provide funds for schools; and that while the state board, state superintendent of public instruction and county school board are agents of the state, they have no duty, power, authority or means to operate the public schools, apart from the will of the local people as expressed by local governing bodies. Finally, the court ruled that state tuition grants are not dependent upon maintenance of public schools.

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[14] The tuition grant program was enacted in its present form in 1960. Section 22-115.29, Code of Virginia, 1950 (1962 Cum. Supp.), recites that the General Assembly "mindful of the need for a literate and informed citizenry" declares it to be the policy of the state to encourage the education of all children. In furtherance of this objective, it is held to be in the public interest to provide scholarships from public funds for the education of children "in nonsectarian, private schools in or outside and in public schools located outside, the locality where the child resides." Authorization is given for levying of local taxes to provide such scholarships.

Section 22-115.30 provides that state grants shall be $125 per child in attendance at elementary schools and $150 per child in attendance at secondary schools. Sections 22-115.31–22-115.36 provide for appropriations for local scholarships and require that local allowances, along with state grants, shall be sufficient to cover the cost of tuition, or a minimum of $250 in elementary school and $275 in secondary school.

With the state law thus settled, the question now presented is whether respondents are similarly free of obligations under federal law.

II.

The Denial of Public Educational Opportunities to Petitioners Violates Their Rights to Substantive Due Process and to Equal Protection of the Laws Secured Under the Fourteenth Amendment to the Constitution of the United States.

1. The holding that respondents in failing or refusing to provide public educational facilities in Prince Edward County have breached no state constitutional obligation does not end the matter. The question before this Court is whether any mandate of the Fourteenth Amendment has been violated.

In *Cooper* v. *Aaron, supra,* at page 19, this Court held that the right not to be segregated in the public schools was "so fundamental and pervasive that it is embraced in the concept of due process of law". It ruled that there was a state duty under the constitution to initiate desegregation and to eliminate racial discrimination. Cf. *Taylor* v. *Board of Education of New Rochelle,* 191 F. Supp. 181, 187 (S. D. N. Y. 1961), 195 F. Supp. 231 (S. D. N. Y. 1961), aff'd 294 F. 2d 36 (2nd Cir. 1961), cert. denied, 368 U. S. 940. Mr. Justice Goldberg, speaking for a unanimous Court, stated in *Watson* v. *Memphis, supra,* at page 530: "*Brown* never contemplated that the concept of 'deliberate speed' would countenance indefinite delay in elimination of racial barriers in schools . . ." Nor, petitioners respectfully submit, does the constitution countenance indefinite frustration in the vindication of the rights it guarantees. Those rights

are "not merely hopes to some *future* enjoyment of some formalistic constitutional promise", id. at 533, their effective and realistic implementation is mandated for the present. Thus, the failure or refusal of respondents to undertake to provide petitioners with public education facilities without discrimination would appear to be, in itself, a denial of due process requirements.

Even apart from participation in a statewide program of public education, therefore, the state's attempted abandonment of public education raises grave constitutional questions. *Brown* recognized the unique and fundamental significance of education in a democratic society. Eradication of ignorance is so indispensable to the preservation of our democratic institutions that provisions for public education, available to all on an equal basis, must be viewed as a sovereign function of the state government serving a central and national, rather than a local, purpose. 47 Am. Jur. *Schools,* Sections 6, 7, pages 299, 300; 78 C. J. S. *Schools and School Districts,* Sec. 17, page 632; *Hoskins* v. *Commissioner of Internal Revenue,* 84 F. 2d 627 (5th Cir. 1936). Cf. *Brown* v. *Board of Education, supra,* at 492; *Taylor* v. *Board of Education, supra.* And see the concurring opinion of Mr. Justice Brandeis in *Whitney* v. *California,* 274 U. S. 357, 372, 375-6 where he stresses a theme recurrent throughout American history that our society places its trust in the power of reason applied through public discussion.

We are not here dealing with a recreational or other publicly supplied facility inviting the utilization of leisure time. The fact that total abandonment of such facilities to defeat declared constitutional rights was held permissible in *Tonkins* v. *City of Greensboro, supra;* and *City of Montgomery, Alabama* v. *Gilmore, supra,* does not mean that such conduct in the more vital area of public education is similarly free from constitutional proscription. Recrea-

tional facilities, their nature, extent and form vary from locality to locality. There is no undertaking to provide such facilities universally or to require adherence to statewide minimum standards or to impose state control and supervision in this field, as is the case with public education. Provision for recreational facilities is still regarded as a local and even private matter—not so with education.

Current newspapers and periodicals reflect a national concern with the quality of public education provided American youth. Survival of our civilization is closely related to governmental ability to provide a broad free public educative process for large numbers of people. American education is under critical examination to determine to what extent it can do a better job of equipping American youth in greater numbers to make meaningful contributions to our society. This is surely not the "moment in history for the state to experiment with ignorance" *Hall* v. *St. Helena Parish School Board, supra.* This is not the time for a state to question the propriety of its support of public education as an appropriate function of government.

Virginia's "experiment with ignorance" is confined to Prince Edward County, but in failing to afford petitioners with public educational facilities without discrimination, respondents have violated their obligations under the Fourteenth Amendment.

2. Equal protection requires that public education be made available in Prince Edward County as long as such facilities are maintained and operated with state support elsewhere in Virginia. *James* v. *Almond, supra,* held that the Fourteenth Amendment forbade the closing of any public school or grade to avoid the effect of the fundamental law, while the state directly or indirectly operates a state school system with public funds, or participates by any arrangement in its management or supervision. Ac-

cord: *Aaron* v. *McKinley, supra.; Hall* v. *St. Helena Parish School Board, supra.*

Under the authority and by virtue of Article IX of the Virginia Constitution and the statutes enacted pursuant thereto, the central and local governments in Virginia have established, and do maintain and operate public free schools in every county except Prince Edward, and did maintain and operate such schools in Prince Edward County until 1959. These schools are financed, supervised and operated jointly by the central and local governments, irrespective of the allocation and division between them of authority and responsibility under Virginia law. The financing of such schools is from general and special tax revenues, including taxes collected from petitioners and other residents of Prince Edward County. Unquestionably, Virginia is still in the business of making public education available on a statewide basis. See *County School Board of Prince Edward County* v. *Griffin, supra.*

The duty to provide unsegregated public education is federal in nature, flowing from the constitutional obligation imposed upon the state to accord equality of privileges to all within its borders. That obligation inhibits the state from providing free public education in other geographical units and divisions in Virginia, while such opportunities and privileges are denied to the children in Prince Edward County. See *James* v. *Almond, supra; Brown* v. *Board of Education, supra; Cooper* v. *Aaron, supra. Gomillion* v. *Lightfoot, supra; Baker* v. *Carr, supra; Hall* v. *St. Helena Parish School Board, supra.* Cf. *Wesberry* v. *Sanders, supra.*

All of the respondents are officers, agents, servants or employees of the state or county. Each has a constitutional or statutory responsibility in regard to the establish-

ment, supervision or operation of the public school system. All are agents of the state in the performance of their duties under state law, see *Kellam* v. *School Board of City of Norfolk*, 202 Va. 252, 117 SE 2d 96 (1960); and *County School Board* v. *Griffin, supra*, and their acts in regard to the operation of public schools constitute "state action" within the meaning of the Fourteenth Amendment. See *Cooper* v. *Aaron, supra*, at page 17; *Raymond* v. *Chicago Union Traction Co.*, 207 U. S. 20, 35-36; *Home Telephone & Telegraph Co.* v. *Los Angeles*, 227 U. S. 278, 286-287.

Burton v. *Wilmington Parking Authority*, 365 U. S. 715, recognized that state action can be accomplished by other than direct and affirmative conduct. In such a case the 14th amendment's safeguards remain operative. For, as this Court stated at page 725 in that case:

> But no State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be . . . By its inaction, the authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination.

A surrender of power and authority which effectuates a denial of equal educational opportunities guaranteed by the constitution is as impermissible as a positive act of discrimination. Prince Edward County has no public schools because its board of supervisors prefers to preserve racial prejudices, even at the price of the sponsorship of ignorance. It has refused to exercise its authority to support schools whereby Negro and white children will be educated in the same classroom. The other respondents have made no attempt to step into the breach. Both the refusal of the board of supervisors and the inaction of the other state officials constitute a denial of equal protection of the laws.

See *Cooper* v. *Aaron, supra; Lynch* v. *United States,* 189 F. 2d 764 (5th Cir. 1951); *State of Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337; Cf. *Lane* v. *Brown,* 372 U. S. 477; *Catlette* v. *United States,* 132 F. 2d 902, 907 (4th Cir. 1943).

The Supreme Court of Appeals of Virginia has decided that, although the state constitution requires the General Assembly to establish and maintain an efficient free public school system, it has met this obligation by affording each locality an opportunity to become a part of the statewide system, if it chooses to do so. This "local option" program is held to enable a county to close its schools without any remedy being provided under state law.

Local option provisions do not make federal guarantees inoperative. A state may not, consistent with the 14th Amendment's command, refuse to provide public schools in one of its subdivisions in order to frustrate federally secured rights, *Cooper* v. *Aaron, supra;* nor may the state withdraw from the field of education in one county, while it continues to furnish educational facilities in all other areas of the state. *Hall* v. *St. Helena Parish School Board, supra; James* v. *Almond, supra.*

"Local option" cannot insulate respondents from responsibility for closing Prince Edward County's schools, nor can it mitigate an obligation imposed by the federal constitution. Respondents' action or inaction is state action, governed by the 14th Amendment. *Lynch* v. *United States, supra; Burton* v. *Wilmington Parking Authority, supra.* Here respondents have sought to insure, for as long as possible, continued denial of nonsegregated education to Negro school children resident in Prince Edward County, in open and defiant violation of petitioner's constitutional rights and the federal courts' commands. Such activity and its judicial sanction are forbidden pursuant to standards

of the Fourteenth Amendment. See *Shelley* v. *Kraemer*, 334 U. S. 1; *Cooper* v. *Aaron*, *supra*.

The opinion below disposed of the decision in *James* v. *Almond*, *supra*, in relation to the issue here raised with the comment, ". . . there was no suggestion that Virginia might not withdraw completely from the operation of schools nor that any autonomous subdivision operating an independent school system might not do so."[15] However, petitioners submit, the issue is not whether Virginia may withdraw completely from the field of public education (although about this petitioners have serious doubts), but whether it can permit school closure in one county, while still participating in a statewide public educational program. *James* v. *Almond*, *supra*, at page 337, held that the Fourteenth Amendment forbade such action, and, petitioners respectfully submit, this is a correct reading of the law which is determinative of this case.

III.

State Action to Frustrate the Operation and Implementation of Equal Educational Opportunities Violates the Fourteenth Amendment to the United States Constitution.

Without regard to specific responsibility for the absence of public schooling in Prince Edward County, it is unassailable that public education rather than traditional racial segregation was abandoned. In order to prevent desegregation, the Prince Edward County Board of Supervisors

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[15] The decision by the Supreme Court of Appeals of Virginia fails to even mention James v. Almond. See County School Board of Prince Edward County, Virginia, et al. v. Griffin, supra.

refused to levy taxes for the support of public schools, after it became manifest that such schools would be required to function on a non-discriminatory basis. The authorization of state and local tuition grants and of local tax credits channeled public funds into support of the segregated Foundation schools. Thus, the state continued its denial of equal educational opportunities mandated by the United States Constitution. *Brown* v. *Board of Education, supra; Cooper* v. *Aaron, supra; Goss* v. *Board of Education of Knoxville,* 373 U. S. 683; *Watson* v. *City of Memphis, supra.* Action by the state which effects, maintains or supports racial discrimination violates the Fourteenth Amendment. *Johnson* v. *Virginia,* 373 U. S. 61; *Watson* v. *City of Memphis, supra; Boynton* v. *Virginia,* 364 U. S. 454; *Browder* v. *Gayle,* 142 F. Supp. 707 (M. D. Ala. 1956), aff'd, 352 U. S. 903.

It is not open to question that discrimination based upon race is invidious and irrelevant, *Steele* v. *Louisville & Nashville Railroad Co.,* 323 U. S. 192; *Goss* v. *Board of Education, supra,* and that the state must forego such distinctions and provide equal educational opportunities to all persons. *Brown* v. *Board of Education, supra; Cooper* v. *Aaron, supra; James V. Duckworth, supra; Bush* v. *Orleans Parish School Board, supra.*

Covert schemes to subvert and avoid implementation of federally guaranteed rights are as objectionable as affirmative and overt acts. This principle obtains whether discrimination be attempted in the selection of juries, *Strauder* v. *West Virginia,* 100 U. S. 303; *Smith* v. *Texas,* 311 U. S. 128; the administration of legislation fair on its face, *Yick Wo* v. *Hopkins,* 118 U. S. 356; the use of federal statutory authority, granted as collective bargaining agent, to effect racial discrimination, *Steele* v. *Louisville & Nashville R. R. Co., supra;* sophisticated efforts to restrict exercise of voting rights, *Terry* v. *Adams,* 345 U. S. 461, or the denial of rights

to unsegregated education. *Cooper* v. *Aaron, supra; Hall* v. *St. Helena Parish School Board, supra; Aaron* v. *McKinley, supra.*

In *Cooper* v. *Aaron, supra,* which concerned a similar attempt of a state to avoid implementation of equal educational opportunities for Negro children, this Court said at page 17:

> Thus the prohibitions of the Fourteenth Amendment extend to all action of the State taking the action, or whatever the guise in which it is taken. In short, the constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this Court in the *Brown* case can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether "ingeniously or ingenuously."

For the purposes contemplated by the Fourteenth Amendment, it is immaterial whether the acts purposed to frustrate the exercise of federal rights are directly traceable to the central state government or to one of its subdivisions. *Aaron* v. *Cooper, supra; Hall* v. *St. Helena Parish School Board, supra.* The controlling factor is the attempt and intent, by acts of commission or of omission, to effect a denial of equal educational opportunities secured by the federal constitution. *Cooper* v. *Aaron, supra; Aaron* v. *Cooper, supra; James* v. *Almond, supra; James* v. *Duckworth, supra; Aaron* v. *McKinley, supra; Bush* v. *Orleans Parish School Board, supra.*

Mr. Justice Frankfurter stated this principle concisely in *Gomillion* v. *Lightfoot, supra,* at page 347:

> When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right.

Thus, any arrangement, device, scheme or plan, direct or indirect, ingenious or ingenuous, whereby respondents seek to frustrate the orders of the federal courts and to deny petitioners their right to public education without discrimination is forbidden.

Public funds were made available to those attending the segregated white Foundation schools in the form of state and local tuition grants sufficient to discharge all of their tuition charges. Additional public funds reached the Foundation through tax credits. Moreover, the sequence of events leading to statutory authorization of tuition grants and tax benefits shows an overall pattern to substitute state-supported "private" white segregated schools for public biracial segregated schools, the object being the maintenance of segregation at any price. There is more than a suggestion that Virginia's dealings with public education in Prince Edward County are punitively motivated. The right to nonsegregated education, having been initially declared as a result of the efforts of Negro children of Prince Edward County, it is these same children and their successors from whom all publicly financed education has been withdrawn.

The use of public funds to accomplish a denial or frustration of basic constitutional rights is proscribed. See *Cooper* v. *Aaron, supra.* Thus, here, petitioners respectfully submit, it is not enough to condemn use of tuition grants for the education of children in private nonsectarian schools for only as long as the public schools remain closed. Public funds are foreclosed from any institution that practices racial discrimination, and their use is also forbidden to avoid, defeat or frustrate declared constitutional rights.

Since the school closing was clearly designed to accomplish and did accomplish an unconstitutional purpose, its invalidity is beyond question. See *Gomillion* v. *Lightfoot, supra.* The injunction against the employment of

public monies, petitioners respectfully submit, must be broad enough to prevent their support of schemes and devices to deny what the federal constitution ordains.[16]

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[16] That the tuition grant and scholarship program may be effectively used to defeat the Constitution's mandate is made clear from Pettaway v. County School Board of Surry County, Civil Action No. 3766, before the United States District Court for the Eastern District of Virginia, unreported, now pending before the United States Court of Appeals for the Fourth Circuit as No. 9286.

It is instructive to quote from the district court's findings of fact:

> Prior to the 1963-64 school session the Surry County School Board operated one school attended by white students only known as Surry School at which both elementary and high school grades were taught.
>
> The School Board also operated New Lebanon School, an elementary school for Negro students, and L. P. Jackson School, an elementary and high school for Negro students.
>
> On June 24, 1963 the State Pupil Placement Board assigned the infant plaintiffs to the Surry School.

IV.

By Way of Relief, This Court May Enjoin the Respondents From Refusing to Provide Financial Support For Operation of Free Public Schools in Prince Edward County.

Petitioners' entitlement to affirmative relief from the closing of public schools in Prince Edward County is urged herein on the basis of three fundamental propositions.

Shortly thereafter a mass meeting of the white citizens of Surry Countly convened at the Community Center. . . .

The situation concerning the assignment of the Negro students to Surry School was discussed and the possibility of a private school for the white students was mentioned. . . .

A second mass meeting of the white citizens of the County was called soon. . . . The persons attending the meeting decided to organize a private school and made preliminary arrangements to accomplish this. They also recommended to the School Board that public schools be continued.

* * *

The officers and directors of Surry County Educational Foundation organized and established a school. . . .

* * *

All of the white pupils who formerly attended Surry School enrolled in the Foundation's school. Negro pupils who had been assigned to the Surry School sought admission to the Foundation's school and were denied. Enrollment in the school is by invitation of the officers of the Foundation. No white child who has applied for admission has been denied. No Negro child who has applied for admission has been enrolled.

On August 24, 1963 the School Board closed Surry School due to lack of sufficient pupils to justify its operation and released all of the teachers in that school from their contracts. These teachers were employed by the Foundation's school.

* * *

The tuition at the Foundation's elementary school is $375 and at its high school $380. State and County tuition grants made available by § 22-115.29 et seq. of the Code of Virginia, 1950, as amended, provide $250 for elementary school children and $275 for high school children. The balance of the cost is being paid by the parents of the individual students upon various terms.

Firstly, public education in Prince Edward County was discontinued to abrogate, frustrate, avoid, and circumvent implementation of petitioners' right to equal educational opportunities. Cf. *Cooper* v. *Aaron, supra; Bush* v. *Orleans Parish School Board, supra.* Secondly, the Commonwealth of Virginia is providing, supporting, and maintaining public schools in all localities of Virginia except Prince Edward County, thereby discriminating geographically against all students in the county. *Gomillion* v. *Lightfoot, supra; Baker* v. *Carr, supra; Hall* v. *St. Helena Parish School Board, supra; Wesberry* v. *Sanders, supra.* And finally, in making public funds available to the white only Prince Edward Foundation schools by means of tuition grants and authorization of tax credits, the state is furnishing education to white children in the county and denying it to Negroes. That such discrimination is prohibited by the Fourteenth Amendment's equal protection and due process clauses is not even arguable. *Bolling* v. *Sharpe,* 347 U. S. 497; *Brown* v. *Board of Education, supra; Cooper* v. *Aaron, supra; Goss* v. *Board of Education, supra; Peterson* v. *Greenville,* 373 U. S. 244. Cf. *Colorado Anti-Discrimination Com. v. Continental Air Lines,* 372 U. S. 714.

Petitioners do not question the conclusions of the state court as to the purpose and effect of state law. Admittedly, the state has broad powers in determining how a privilege of the state shall be bestowed, but where it acts to alter or destroy a federally guaranteed right, that action is subject to review and the consequent injury is subject to reparation by the federal courts.

Petitioners' right to nonsegregated education is patent. *Brown* v. *Board of Education, supra.* Equally evident is the obligation of the state to accord its benefits on a nondiscriminatory basis. *Cooper* v. *Aaron, supra.* Given this correlative constitutional right and duty, this Court may order such equitable relief as will effectuate the reopening of schools in Prince Edward County. Any remedy, to be adequate, must accomplish a vindication of petitioners'

rights and compliance with the law by state officials. Such redress and obeisance can be achieved only by enjoining the respondents from failing to take the necessary steps—*i.e.*, levying the required taxes and appropriating sufficient funds for the operation of the public schools in Prince Edward County for the school year commencing in September, 1964 and thereafter. There is no doubt that this Court may render such relief. Cf. *Cooper* v. *Aaron*, *supra*.

In *Sterling* v. *Constantin*, 287 U. S. 378, 403, this Court said:

> If the matter is one of judicial cognizance, it is because of an alleged invasion of a right, and the judicial power necessarily extends to the granting of the relief found to be appropriate according to the circumstances of the case.

Federal courts have such power as would secure the preservation and protection of rights guaranteed by the United States Constitution, and this Court is commissioned to enforce such decrees as it may enter. *Virginia* v. *West Virginia*, 246 U. S. 565; *Sterling* v. *Constantin*, *supra*. Moreover, that power is not limited because its exercise would require a subdivision of a state to levy taxes. There is ample decisional authority for requiring political subdivisions to levy taxes in order to protect constitutional rights. *Labette County Commissioners* v. *Moulton*, 112 U. S. 217; *Graham* v. *Folsom*, 200 U. S. 248; *Supervisors* v. *United States*, 71 U. S. (4 Wall) 435; *Walkley* v. *City of Muscatine*, 73 U. S. (6 Wall) 481; *Von Hoffman* v. *City of Quincy*, 71 U. S. (4 Wall) 425; *Cherokee County* v. *Wilson*, 109 U. S. 621; *Riggs* v. *Johnson County*, 73 U. S. (6 Wall) 166. That the power to levy taxes for the support of schools is discretionary with the board of supervisors does not mitigate against this Court's capacity to require that it be done. See *City of Galena* v. *Amy*, 72 U. S. (5 Wall) 705, 708, where the city refused to levy taxes it was authorized to raise, leaving debtors unpaid, and this Court held: "Under such circumstances, the discre-

tion thus given cannot, consistently with the rules of law, be resolved in the negative". The rights of the creditors, justice and the law were held to demand affirmative action. And it should not be forgotten that here the board of supervisors' refusal is expressly designed to defeat and frustrate petitioners' constitutional rights to unsegregated education. Under such circumstances, relief, in the form of an affirmative requirement that sufficient taxes be levied, is patently within the competence of the federal courts. See *Cooper* v. *Aaron, supra; James* v. *Duckworth, supra.*

Moreover, it is respectfully submitted, a decree should be entered barring the use of public funds to support any institution that practices discrimination or from employment in aid of any attempt and effort to avoid or frustrate the fundamental rights of children to public educational facilities without racial restrictions.

Injunctive relief is not precluded by the Eleventh Amendment, although affirmative action is required. Respondents have, through a cooperative effort, deprived petitioners of their rights to nonsegregated public education. Although the more obvious intransigence is on the part of the county board of supervisors, their recalcitrance has been aided, abetted and acquiesced in by the local school board, the state board of education and the state superintendent of public instruction. Dispositive of this issue is the nature of the right invaded. Acts in defiance of constitutional inhibitions or policies threatening federal rights, remove this case from the limitations of the Eleventh Amendment. See *Ex parte Young*, 209 U. S. 123; *Osborne* v. *The Bank of the United States*, 22 U. S. (9 Wheaton) 738.

CONCLUSION

Wherefore, for the reasons hereinabove stated, it is respectfully submitted that this Court should enter a judgment ordering and requiring: (1) that respondents take all necessary steps, individually and collectively, to reopen and operate the public schools on a non-discriminatory basis in Prince Edward County by September, 1964 and thereafter; and (2) that no state or local tuition grants, tax credits or other public funds be used to underwrite attendance at any institution in Prince Edward County, or in the state of Virginia, that practices racial discrimination, and (3) that the district court, upon remand, retain jurisdiction in order to implement, promptly and effectively, this Court's decree and mandate.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 592

COCHEYSE J. GRIFFIN, etc., *et al.*,
Petitioners,

v.

COUNTY SCHOOL BOARD OF
PRINCE EDWARD COUNTY, *et al.*,
Respondents.

BRIEF *AMICUS CURIAE* SUBMITTED BY THE CITY OF CHARLOTTESVILLE IN SUPPORT OF THE CONSTITUTIONALITY OF THE VIRGINIA STATE SCHOLARSHIP PROGRAM

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Statement

The City of Charlottesville, sponsored by its authorized law officer, Paul D. Summers, Jr., City Attorney, files this brief pursuant to Rule 42(4) of the Rules of this Court solely in support of the constitutionality of the Virginia State Tuition Grant Law as enacted and as applied generally.

The City takes no position on the validity of any application of that law in Prince Edward County, or its supplementation by local ordinance—or even as to whether there properly are such issues now before this Court.

The Virginia State Scholarship Program

History of Tuition Grant Legislation

For thirty-four years past, Virginia has maintained some type of tuition grant program which has made available an educational option either to attend state-supported public schools or to receive financial aid for any approved instruction in other districts or in private schools.* As the Court of Appeals correctly noted (R. 220; 322 F. 2d 332, 339), "Virginia's program of tuition grants to pupils • • • has a lengthy history." As there described (*ibid.*, fn. 18):

> "Virginia's tuition grant program had its first beginning many years ago in aid of children who had lost their fathers in World War I. It was expanded to include others until 1955 when the Supreme Court of Appeals of Virginia held that the tuition grants were in violation of Virginia's Constitution when given to pupils attending private schools."

The Supreme Court of Appeals of Virginia, in *Almond* v. *Day*, 197 Va. 419, 89 S.E. 2d 851 (1955), held the Virginia Constitution to have been violated to the extent that State monies were used to pay the fees of children attending private schools, and held that both the State and Federal Constitutions forbade such grants being used to meet tuition payments in sectarian schools. To re-

* Acts 1930, c. 375, p. 810; Acts 1932, c. 147, p. 193; Biennial Appropriation Acts 1934 through 1948 (Acts 1934, c. 358, p. 593; Acts 1936, c. 422, p. 845; Acts 1938, c. 428, p. 893; Acts 1940, c. 425, p. 790; Acts 1942, c. 475, p. 803, Item 103; Acts 1944, c. 407, p. 688, Item 114; Acts 1946, c. 388, p. 817, Item 122; Acts 1948, c. 552, p. 1173, Item 129; Acts 1950, c. 578, p. 1377, Item 129; Acts 1952, c. 716, p. 1223, Item 203; Acts 1954, c. 708, p. 970, Item 210; Acts 1952, c. 83, p. 100.

establish the tuition grant program, the voters of the Commonwealth quickly approved an amendment to Section 141 of the Virginia Constitution to provide:

> "• • • that the General Assembly may, and the governing bodies of the several counties, cities and towns may, subject to such limitations as may be imposed by the General Assembly, appropriate funds for educational purposes which may be expended in furtherance of elementary, secondary, collegiate or graduate education of Virginia students in public and nonsectarian private schools and institutions of learning, in addition to those owned or exclusively controlled by the State or any such county, city or town; • • •"

In 1956, an extra session of the Virginia Legislature incorporated the tuition grant statutes into the "massive resistance" legislative program by keying them to localities where integration had been ordered in the public schools. Acts 1956, Ex. Sess., c. 68, p. 69, and c. 69, p. 72 (Code of Virginia, 1950, as amended (1958 Cum. Supp.), §§22-188.3 *et seq.*, and 22-188.30 *et seq.*). No federal court review was needed. On its first test, the Supreme Court of Appeals of Virginia held the 1956 law to be clearly unconstitutional in *Harrison* v. *Day*, 200 Va. 439, 106 S.E. 2d 636 (1959). The 1959 extra session then repealed the 1956 provisions.

By 1959, massive resistance had run its course in Virginia. The Perrow Commission on Education reported to Governor Almond on March 31 of that year that Virginia should abandon any further legal opposition to integration.

> "The truth is that neither the General Assembly nor the Governor has the power to overrule or

nullify the final decrees of the federal courts in the school cases.

"There is sentiment that it would be better to have no public schools than to have any mixed schools anywhere in Virginia. However, we believe that at this time a majority of the people of Virginia is unwilling to have the public schools abandoned.

"Accordingly, we propose measures to bring about the greatest possible *freedom of choice* for each locality and each individual.

"We recommend that scholarships be made available to children in every locality to attend nonsectarian private schools.

• • • • •

"These proposals permit the preservation of public free schools and implement flexible local autonomy. They are founded on the twin principles of local determination and *freedom of choice.*" (p. 6)

The nature of the policy reversal recommended by the majority was made even clearer by the dissenting members:

"The question is, are the people of Virginia ready to make the necessary amendments to the Constitution and continue a program of massive resistance? So far as we are concerned, we are ready.

• • • • •

"The majority report acknowledges the superior power of the federal courts and that no locality will be able to place the State and her sovereign power between it and the federal court. Every locality will be without any legal weapon to prevent court-ordered integration." (p. 24)

The Perrow Report was accepted by Governor Almond and he recommended the proposed bills to the Virginia Legislature:

Address of J. Lindsay Almond, Jr., Governor
(Excerpts)

"Scholarships—Aid to Education

"In my judgment the [Perrow] Commission has greatly improved and reinforced the status of grants in aid of education. It has endeavored and, I believe, succeeded in evolving sound tuition grant procedure. The scope has been broadened to provide scholarships to all children entitled to attend the public free schools who prefer to attend private rather than public schools. The State and localities would participate jointly. The locality's share would be the same percentage as its contribution to the cost of operating public schools.

"The Commission gave attention to the matter of tuition charges relating to a child attending school in another locality. It is recommended that such tuition be limited to the total per capita cost of education, excluding debt service and capital outlay, of the public schools of the locality to which the child is admitted."

The Governor's philosophy was accepted, "massive resistance" was dropped, and, by means of the statutes adopted at the extra session of 1959, Virginia embarked upon a broader educational freedom of choice which thereafter included all children without distinction on the basis of the color, race or creed of the pupil or of his choice of any non-religious public or private school.

The Operation of the Tuition Grant Program

1. The Statute and Regulations

The Tuition Grant Program is contained in Sections 22-115.29 through 22-115.37 of the Code of Virginia (Acts 1960, c. 448 and c. 461), which are set out in full as Appendix A to this brief. The procedures under those statutes are set by "Regulations of the State Board of Education Governing Pupil Scholarships," issued June 28, 1963, which are attached as Appendix B. An application form and instructions are included as Appendix C.

As the Code and Regulations indicate, State scholarship aid is available to any child in the State who prefers to receive his educational entitlement for use at any qualified school other than the public school in his own district. There is no limitation to the schools of Virginia or, so far as the statutory language is concerned, even to schools in the United States. The pupil has an almost unlimited choice of private or public, special purpose, vocational, or remedial schools, the only limitation being that the school shall be a qualified educational institution having a course of instruction approved by the Superintendent of Public Instruction—a requirement which dates back to 1932.* To avoid any possibility that such approval might be given or withheld on racial grounds, the State Board of Education, in prescribing the minimum academic standards for a school, is forbidden to

> "• • • deal in any way with the requirements of such school concerning the eligibility of pupils who may be admitted thereto." (Code of Virginia, 1950, as amended (1962 Cum. Supp.), § 22-115.33).

* Acts 1932, c. 147, p. 193, provided for the payment of matriculation fees, board and room rent, books and supplies "at any educational institution in the State of Virginia approved in writing by the superintendent of public instruction."

Under the program local school boards are permitted, but not required, to supplement the State aid. If a local board fails to do so, the State Board of Education will direct the Superintendent of Public Instruction to provide an equivalent on behalf of the local government, an amount which will thereafter be deducted from the locality's distribution of State funds which have been appropriated for purposes *other* than education or welfare (Code of Virginia, 1950, as amended (1962 Cum. Supp.), § 22-115.34). Petitioners' suggestions to the contrary notwithstanding, public school appropriations may not be used for scholarship aid, and accordingly the program does not decrease educational funds at either the State or local level.

The combined aid from State and locality in no case exceeds the per pupil cost of maintaining the applicant in the public schools of his community. State assistance is limited to a maximum of $250 to elementary school children, $275 for high school children, less when the locality also contributes. In no event does the combined aid exceed actual tuition charges paid by the child's parents at the school of their choice.

As an example of the wide variation which this covers, the cost of public education in 1962-63 ranged from $190.23 in Buchanan County to $555.04 in Arlington County. However, there can be no net cost of the tuition grant program to the State or to the locality, since the grants made are always equal to or less than the local public school operating cost per pupil. By way of example, the present average tuition grant in Richmond is $259.18 as compared with a public school cost of $362.11. Charlottesville, on the other hand has paid grants in amounts equal to the operating cost of $306 per pupil in the City's public schools (1963-4).

2. Operation Under the Statute

The Court of Appeals noted (*Griffin, supra,* p. 340), that thirty-one school districts of Virginia are now desegregated. Yet, only about 1% of the eligible children of the State have applied for scholarship assistance and the amounts expended for it have been less than 1% of the State's public school budget.

For the last three years in which this legislation has been in effect, the actual figures on applications are as follows:

	Children Receiving Public Aid		Combined State and Local Operating Expenditures for Education[1]		
Year	In Public Schools	By Tuition Grants	For Public Schools	For Tuition Grants	Per Cent for Tuition Grants
1960-61	787,195	8,127	204,965,512	1,755,543	0.856
1961-62	811,984	8,518	227,897,829	2,074,690	0.910
1962-63	840,000	9,489	253,155,192	2,252,995	0.889

[1] Not including capital outlays, interest, or State administrative expenses.

* * * * *

An analysis of the 9,489 applications approved last year shows 5,873 were elementary pupils, 3,656 high school pupils; 5,507 were boys, 3,982 girls; 9,147 were white, 331 Negro and 11 other.* Of the grantees, 8,429 attended some 429 private schools within the United States and 1,060 attended public schools outside their own district. Eight thousand nine hundred four applications were processed locally, 585 were handled by the State's Department

* Mostly illegible. But since the indication of race has only statistical significance, illegibility on this item of the application form did not disqualify the applicant.

of Education and paid directly to the applicants. Of the total scholarships of $2,252,995, the State paid slightly more than half, $1,190,418 against $1,062,577 paid from local funds.

The listing of schools attended by Virginia children receiving tuition aid is too long to include in this brief. The following list covers only the City of Charlottesville and Albemarle County.

Albemarle High
Augusta Military Academy
Belfield
Brookside
Burnley Moran Elementary
Clark Elementary
Clarke School for Deaf
Cunningham District
Darrow
Dyke Elementary
Elmer Myers
Fishburne Military Academy
Fluvanna County High
Fountain Valley School of Colorado
Greenbrier Elementary
Grier
The Gunnery
Highland Springs High
The Hill School
Howard School for Girls
Indian Mountain
Johnson Elementary
Lane High
Lawrenceville
McGuffey Elementary
McIntire
Merridale
Miller
Milton Academy
Mount Berry School for Boys
Oldfields
Phillips Exeter Academy
Proctor Academy
Robert E. Lee
Rock Hill Academy
Rose Hill Elementary
Shipley
St. Paul's
Solebury
Staunton Military Academy
Stoutamyre School of Special Education
Taft
Venable Elementary
Washington School of Ballet
William Monroe High
Woodberry Forest

As the Court will see, the schools attended are as various as the applicants—military schools, prep schools,* boys' schools, girls' schools, special purpose schools, vocational schools, Virginia schools and schools in a dozen other states. Nothing could better illustrate the breadth of the choice in education which the tuition grant program makes possible than the many uses to which this program can be put in one relatively small city and county.

The Interest of the City of Charlottesville as *Amicus Curiae* in Sustaining the Validity of the Virginia State Scholarship Laws

The City has both a financial and educational interest in the continuation of the scholarship program. The financial interest arises from the difference to the City between the outlays for program recipients and public school pupils. In the quotation given above (p. 5), Governor Almond pointed to this difference in referring to maximum payments of the "per capita cost of education, *excluding debt service and capital outlay.*"

On new construction and school equipment today, capital outlay approximates $2,500 per pupil. If the 761 children in Charlottesville who now receive tuition grants were to transfer to public schools, the City could be required to invest close to $2,000,000 for their accommodation. Annual debt service on such a sum would be nearly

* Of particular interest are the large number of high-cost in and out-of-state college preparatory schools. These serve to illustrate the scholarship nature of the tuition grant program. Many lower income families who would be unable to meet higher school costs unaided enter their children through the assistance afforded by the State's program. This is particularly helpful in a city like Charlottesville with a large number of University staff members oriented toward specialized education.

$60,000, without amortization. Since public school operating costs for this number of pupils would be substantially equal to the amount now being paid as tuition grants, $115,231, the City would be out of pocket its capital investment and interest charges without any compensating educational benefit to its citizens.

But of considerably greater importance to the City than the saving is the civic obligation to obtain the best possible education for its children. The City and school authorities of Charlottesville believe that those who would not be most effectively taught in the public schools should be given every opportunity to select the training which will prove most suitable to them as individuals.

In the opinion of the City the State's scholarship program is a major step toward this objective. In our view this legislation constitutes a necessary accommodation of the mass public educational process to the special needs of the minority or non-average individual. Every child in Charlottesville, no matter his color or his means, has an absolute freedom of choice to attend a City school or to obtain, as an option, a scholarship for use in any other qualified public or private school in the continental United States. Whether or not such a program is capable of misuse in a specific situation, the families of this City and of the other communities of Virginia should not be deprived of its fundamental educational advantages.

Summary of Argument

I

The Constitutional Validity of Granting State Scholarship Aid Is Not at Issue in this Case

II

There Is No Constitutionally Significant Relation Between the State and the Schools Selected by Grant Recipients

III

Scholarship Assistance Made Available to All Children on Equal Terms Without Regard to Race, Creed or Color Is Valid as an Expression of the State's Educational Obligation Consistent with First Amendment Freedoms

IV

The Petitioners Make No Case for a General Review of the Scholarship Aid Program in Virginia

V

The Special Objections of the Church Schools Have No Basis in the Rulings of this Court

ARGUMENT

I

The Constitutional Validity of Granting State Scholarship Aid Is Not at Issue in this Case

It is the position of the City of Charlottesville that under the established principles of judicial restraint, a review of the Virginia Scholarship program is not called for by the Court on this record. If the Court agrees with us on this point, none of the other points hereinafter made need be considered.

There Is No Basis in the Law for Broad Anticipatory Constitutional Declarations

This Court has many times held that the constitutionality of state statutes will not be considered except where that issue is squarely presented on the record and a decision is essential to resolve an actual controversy between the parties before the Court.

The general principle and leading cases are collected and summarized in 11 Am. Jur., *Constitutional Law*, § 93:

> "[The Supreme Court of the United States] has announced that it rigidly adheres to the rule never to anticipate a question of constitutional law in advance of the necessity of deciding it, never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied, and never to consider the constitutionality of state legislation unless it is imperatively required."

First, the precise facts of the case involved must pose the question for decision. "It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case", *Burton* v. *United States*, 196 U. S. 283, 295 (1905). Or, as said in *Liverpool, N. Y. and Phila. S.S. Co.* v. *Commissioners of Emigration*, 113 U. S. 33, 39 (1885):

> "[This court] has no jurisdiction to pronounce any statute, either of a state or of the United States, void, because irreconcilable with the constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies * * * [and will] never * * * anticipate a question of constitutional law in advance of the necessity of deciding it. * * *"

Second, the Court will not anticipate or presume an unlawful application of a statute. In *Mountain Timber Company* v. *State of Washington*, 243 U. S. 219, 246 (1917), this Court phrased the basic rule of judicial restraint as follows:

> "* * * we will not assume in advance that a construction [of a state statute] will be adopted such as to bring the law into conflict with the Federal Constitution."

a proposition reaffirmed in *Wilshire Oil Co.* v. *United States*, 295 U. S. 100 (1935); *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 324 (1936); *Allen-Bradley Local No. 1111* v. *Wisconsin Employment Relations Board*, 315 U. S. 740, 746 (1942); *Toomer* v. *Witsell*, 334 U. S. 385 (1948), and many others.

Third, the Court will always select the constitutionally valid interpretation of the questioned statute if any exists;

"It is a firm rule of constitutional interpretation in this Court that a statute will be held invalid only when no possible application would be lawful" (*Ex Parte Mitsuye Endo*, 323 U. S. 283, 299 (1944)). As said in *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337, 351 (1937), "We apply the familiar canon which makes it our duty, of two possible constructions, to adopt the one which will save and not destroy [constitutionality]"; also, *Crowell* v. *Benson*, 285 U. S. 22, 46, 62 (1932); *Grenada County* v. *Brown*, 112 U. S. 261, 269 (1884); *Minnesota ex rel. Pearson* v. *Probate Court*, 309 U. S. 270, 274 (1940); *Driscoll* v. *Edison Light & Power Co.*, 307 U. S. 104, 115 (1939); *Stephenson* v. *Binford*, 287 U. S. 251, 277 (1932).

The basic issue in this case is whether the schools in Prince Edward County can remain closed while other schools in the State of Virginia remain open. With that issue this brief is not concerned. The involvement of the Scholarship Aid program of the State of Virginia is, at most, collateral to that substantive issue. The District Court in its opinion enjoined the payment of scholarship funds in Prince Edward County on the ground that "State scholarships are not available to persons residing in counties that have abandoned public schools"; *Allen v. County School Board of Prince Edward County*, 198 F. Supp. 497, 504 (E.D. Va. 1961). As the court itself pointed out, it was dealing solely with "the question of the lawfulness of the payment of state tuition grants to residents of Prince Edward County during the time public schools are closed" (*id.*, 503). In other words, the District Court did not pass on or consider that it had before it the question of the constitutional validity of the State Tuition Grant Law as such or its application outside Prince Edward County.

This absence of any constitutional question regarding the State scholarship laws was reiterated by the Court of Appeals (322 F. 2d 332, 339-340):

> "As indicated above, Virginia's tuition grants had a considerable history. *That program has not been attacked in this case. Its constitutionality has not been questioned.*
>
> * * * * *
>
> "* * * the basic program of tuition grants, however, its antecedents and its operation and effect were not examined by the court below." (Emphasis added.)

Moreover, the question of scholarship aid arose only on the limited question of whether the defendants in the trial court, the respondents here, had schemed to use these State funds in order to circumvent the court's order of April 22, 1960 (198 F. Supp. 497, 498). The Court was considering not the validity of the law itself, but the collateral question of the defendant's special use of it in Prince Edward County—not as to its general effect on the schools, but only the extent to which such a use affected the existing court order.

Clearly, therefore, the underlying constitutional validity of the Scholarship Aid program in the State of Virginia is not a matter which has been placed in issue in either of the courts below or by any of the facts of record. If it can be said that the statutes are involved at all, the maximum issue on the present record would be the effect of such payments on a particular court order when the same county officials had closed the county schools. There is no basis in the law for generalizing in broad constitutional terms from such a limited situation, particularly in the

light of the further finding of the Court of Appeals (322 F. 2d 332, 340):

> "Elsewhere, apparently, [the tuition grant program] has not been utilized to circumvent the segregation [sic] of public schools."

There Is No Evidence in the Record on Which a General Assertion of Unconstitutionality Could Be Based

Apart from any lack of consideration by the courts below of the broad question which these petitioners now raise for the first time, there seems to us to be little factual basis on which to predicate a judgment even as to the effects of the program in Prince Edward County. On the record, payment was made in 1960-61 but no grants were paid before or since. No such grants were paid in 1959-1960 (R. 185) and the District Court on August 25, 1961 (198 F. Supp. 497) prohibited further payment on the ground that the law itself was not applicable in a county where the public schools were closed. Accordingly, whatever effect the payment of tuition grant funds might suppositiously have had in encouraging the development or continuation of private segregated schools in Prince Edward County, the fact is that with the single exception of the school year mentioned, they were not so paid, and substantially all substitute education in the County was financed by private contribution. Accordingly, not only can we say that the validity of the State Scholarship Aid program was not legally an issue on this record, we can equally say that there seems to be scant factual basis in the record upon which either its efficacy or its effect can be judged.

Apart from any paucity of evidence of the effect of the tuition law in Prince Edward, there is a complete absence

of any proof in the record as to its effects elsewhere in the State. All of the data set out above indicates that there is no substantial relation between the Scholarship Aid program and the progress of school desegregation.

First, it does not seem that it could have any effect. If only 1% of the eligible children of the State are recipients of scholarship aid this is clearly *de minimis*—especially at a time when up to 10% integration is referred to as "*de facto*" segregation. Therefore, even if we were to assume that all of such students were intending to use scholarship aid to attend segregated schools, there would be no noticeable effect on the progress of desegregation in the State. Actually, as the listing of schools, *supra*, p. 9, shows, many of the grant recipients have used the funds not to go to segregated schools but to attend integrated schools both in Virginia and in other states.

And a most important point has been overlooked in this regard. The State Tuition Grant program permits any child living in an area where the schools may still be separate or insufficiently integrated to suit his own educational desires, to take State scholarship aid and attend a racially mixed public or private school of his own choosing without any of the expense or delay which a desegregation suit might involve. During the current school year, there are 58 tuition grant recipients who have come from outside the Charlottesville School District in order to attend two well-known Charlottesville schools which have been integrated for some years past—Lane High School and Venable Elementary School. Similarly, of the 331 negroes receiving scholarship aid during the current school year, many are using the money to attend integrated schools.

We have just shown that the State Scholarship Aid program has no necessary or even probable effect in discouraging further school integration in the State taken as a whole. This is equally true of specific localities. Even if we hypothesize a disproportionate number of applications for tuition grants in an area where a school desegregation suit is pending, the scholarship aid statutes are not of themselves a meaningful factor in the outcome. The District Court in the present case has shown that any federal court in protection of its own jurisdiction could require the withholding of such benefits in the area concerned under its injunctive powers. Since the extent to which the law will be applied in the school district concerned is therefore wholly within the control of the local court, the question of the statute's over-all validity would not and could not arise.

Finally, the fact that a statute may be misused is not of significance. As the cited precedents show, the mere possibility of misuse cannot be a basis for a finding of unconstitutionality. Tax and licensing statutes, police and welfare statutes, and many others could be equally misapplied in a hypothetical situation to initiate or continue an unlawful separation between the races. It is the misuse, not the statute itself, which the law corrects.

II

There Is No Constitutionally Significant Relation Between the State and the Schools Selected by Grant Recipients

It is established that a state may not forbid the education of its children at private schools, *Pierce* v. *Society of The Sisters, etc.*, 268 U. S. 510, (1925), nor limit their

freedom to dissent even in the public schools, *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 627 (1943). The State may constitutionally pay educational expenses incurred for attendance of its children at private schools, *Cochran* v. *Louisiana State Board of Education*, 281 U. S. 370 (1930); *Everson* v. *Board of Education of Ewing Tp.*, 330 U. S. 1, (1947), and the granting of such aid is a grant to the child and does not therefore constitute spending of state funds for the support of the school. As stated in *Cochran* (pp. 374-5):

> "'One may scan the acts in vain to ascertain where any money is appropriated for the purchase of school books for the use of any church, private, sectarian, or even public school. The appropriations were made for the specific purpose of purchasing school books for the use of the school children of the state, free of cost to them. It was for their benefit and the resulting benefit to the state that the appropriations were made. True, these children attend some school, public or private, the latter, sectarian or nonsectarian, and that the books are to be furnished them for their use, free of cost, whichever they attend. The schools, however, are not the beneficiaries of these appropriations. They obtain nothing from them, nor are they relieved of a single obligation, because of them. The school children and the state alone are the beneficiaries.'
>
> • • • • •
>
> "Viewing the statute as having the effect thus attributed to it, we cannot doubt that the taxing power of the state is exerted for a public purpose. The legislation does not segregate private schools, or their pupils, as its beneficiaries or attempt to interfere with any matters of exclusively private

> concern. Its interest is education, broadly; its method, comprehensive. Individual interests are aided only as the common interest is safeguarded."

The Scholarship Aid program of Virginia is even further from the concept of state action with relation to the schools concerned than were the textbook and bus situations described in *Cochran* and *Everson*—in both of which the State was in necessary contact with the schools concerned. In Virginia, to the contrary, payment is not made to or for the schools but goes directly to the parents or guardian of the applicant and only upon a showing that the child has been enrolled in and has attended a qualified school. (Code of Virginia, 1950, as amended (1962 Cum. Supp.), §§22-115.33 and 22-115.35; Regulations, pp. 2-3; *infra*, pp. A-4, A-5, B-3, B-6). In other words, the school-pupil relation has already been established before the State acts at all. And, as previously noted, the State is forbidden to ever consider eligibility requirements in approving the student's choice (Code of Virginia, 1950, as amended (1962 Cum. Supp.), §22-115.33).

Under these circumstances, there is clearly no "state action" limiting the freedom of choice of any individual or encouraging the attendance at or avoidance of any school. This Court pointed out the distinction between state action and private choice in *Shelley* v. *Kraemer*, 334 U. S. 1, 13 (1948) when it said:

> "Since the decision of this Court in the Civil Rights Cases, 1883, 109 U. S. 3, 3 S. Ct. 18, 27 L. Ed. 835, the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful."

This distinction as applied to education is illustrated by the two *Girard College* decisions. In the first, direct state action was found where a state agency denied school admission to the petitioners solely on the basis of color, *Pennsylvania* v. *Board of Directors of City Trusts*, 353 U. S. 230 (1957). In the second, the admission policy set by the founder was unchanged, but the state agency no longer had any voice in controlling admissions and had therefore not acted in denying the petitioners' applications, *In re Girard College Trusteeship*, 391 Pa. 434, 138 A. 2d 844 (1958), *app. dism.* and *cert. den.* 357 U. S. 570 (1958). Similarly, *Norris* v. *Mayor and City Council of Baltimore*, 78 F. Supp. 451, 460 (D. Md., 1948); *Dorsey* v. *Stuyvesant Town Corp.*, 299 N. Y. 512, 87 N.E. 2d 541 (1949), *cert. den.* 339 U. S. 981 (1950).

This principle is repeated where the United States rather than a state is the source of the funds concerned as in the "G.I. Bill" for education of veterans (payments made directly to schools, 38 U.S.C., Supp. III §§ 701 *et seq.*) or in the recently proposed tax credits for educational expenditures (S.A. 329, Cong. Rec., 88th Cong., 2d Sess., p. 1697). Both considered the question of avoiding unconstitutional "state action" in the supporting of church schools. It was pointed out by the President's Committee on Education Beyond the High School that the G.I. Bill was not "designed to help, even indirectly, the institutions," and the tax credit plan could also be adopted "without raising the legal issue of 'church-state' relations" (Second Rept. to the President, G.P.O., 1957, pp. 51-2, 96) and in this way was distinguished from cases defining a violation of the "establishment" clause of the First Amendment, *Illinois ex rel. McCollum* v. *Board of Education*, 333 U. S. 203 (1948); *Zorach* v. *Clauson*, 343 U. S. 306 (1952); *Everson, supra*, p. 20.

Under the Virginia laws here in question, the state has no voice in the selection of a school, no control over its admission policies, no right to distinguish—much less discriminate—in fixing the amount of the substitute payments to be made nor, within reasonable academic limits, any right to delimit the course of study to be pursued. Not only is there no positive action required by the State with respect to any such school, the legislation is such that Virginia is prohibited from so acting. Under these circumstances and the precedents cited, it seems clear that there does not here exist the essential involvement of State direction, or even State ability to deny to any individual a constitutionally guaranteed right.

III

Scholarship Assistance Made Available to All Children on Equal Terms Without Regard to Race, Creed or Color Is Valid as an Expression of the State's Educational Obligation Consistent with First Amendment Freedoms

We have first argued that the constitutionality of the Scholarship Aid program of Virginia is not legally or factually involved in this case or, alternatively, that such a determination is in any event unnecessary to secure the relief that petitioners seek. Second, we have said that such legislation is necessarily not subject to constitutional attack as discriminatory for lack of "state action," as long as the state merely furthers education generally and lacks the choice or even the power to favor the public or the private school or the integrated or separated school or to control or even influence the pupil's free choice in this regard.

Assuming that neither of these points is acceptable to the Court, we come then to the ultimate question, whether it is constitutional for a state to make it possible for its children to choose between an integrated or a segregated school.

If the Virginia Tuition Grant program gave scholarship aid exclusively to children who intended to enroll in separate schools for boys or girls, vocational schools, remedial schools, or other special purpose education, it would be totally unnecessary for the City to file this brief. That a state has a wide choice within the bounds of the doctrine of reasonable classification, to pattern the educational opportunities it offers to its children to their educational necessities seems too patent to require discussion. That a state may carry out this obligation in the form of broadening the optional choices available to each child not only is clearly valid, but is socially commendable. The only basis which the petitioners could possibly have for inveighing against a system of demonstrable educational value is that some of the children involved will elect to attend schools which are not racially integrated.

The issue is not hard to define. All freedoms have positive and negative aspects—freedom to act and freedom from the actions of others. Did this Court hold, in 1954, in *Brown* v. *Board of Education*, 347 U. S. 483, (1954), that the Constitution requires the compulsory congregation of the races in every public school? Or did it hold, more simply, that the constitutional right of those petitioners was to be considered for school admission on a non-racial basis? It is our position that this Court has held, in *Brown* and in *Aaron* v. *Cooper*, 358 U. S. 28, (1958), that the equal protection of the law is a right appertaining to the individual, including his freedom to

associate himself with a group of his own choosing, and that it was indeed his freedom to do so which could not be constitutionally limited by state action.

This dichotomy of affirmative and negative constitutional values was noted by Herbert Wechsler, in giving the Oliver Wendell Holmes Lecture at Harvard Law School in 1959 ("Toward Neutral Principles of Constitutional Law," p. 39):

> "But if the freedom of association is denied by segregation, intergration forces an association upon those for whom it is unpleasant or repugnant. Is this not the heart of the issue involved, a conflict in human claims of high dimension not unlike many others that involve the highest freedoms that Professor Sutherland has recently described. See *The Law and One Man Among Many* (1956), 35 et seq."

The dilemma which Professor Wechsler sees is largely solved by a tuition grant program because it maximizes the freedom of choice of the greatest number of individuals without coercion of, or discrimination against, any. That the association which an individual seeks is not a popular or socially desirable one is all the greater reason why the law should protect his freedom to make it. As the Court said in *Murdock* v. *Commonwealth of Pennsylvania*, 319 U. S. 105, 115-6 (1943):

> "Considerable emphasis is placed on the kind of literature which petitioners were distributing—its provocative, abusive, and ill mannered character and the assault which it makes on our established churches and the cherished faiths of many of us.* * * Plainly a community may not supress, or the state tax, the dissemination of views because they are unpopular, annoying or distaseful.* * * That would be a complete repudiation of the philosophy of the Bill of Rights."

Mr. Justice Douglas and Mr. Justice Black, dissenting in *Lerner* v. *Casey,* 357 U. S. 468, 412-13 (1958) phrased it thus;

> "Among the liberties of the citizens that are guaranteed by the Fourteenth Amendment are those contained in the First Amendment.* * * These include the right to believe what one chooses, the right to differ from his neighbor, the right to pick and choose the political philosophy that he likes best, the right to associate with whomever he chooses, the right to join the groups he prefers, the privilege of selecting his own path to salvation."

An earlier great dissenter argued that this right, for the right to be let alone, to enjoy the freedom of personal association. Mr. Justice Brandeis said in *Olmstead* v. *United States,* 277 U. S. 438, 478-9 (1928):

> "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect * * *. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."

See, also, *Board of Education* v. *Barnette, supra,* overruling *Minersville School District* v. *Gobitis,* 310 U. S. 586 (1940), in which another dissenter, Mr. Chief Justice Stone, had said (*id.,* p. 604):

> "The guarantees of civil liberty are but guarantees of the human mind and spirit and of reasonable freedom and opportunity to express them."

It is this freedom of association, this freedom to assemble with others of like persuasion, which was granted protection by this Court in *National Association for the Advancement of Colored People* v. *State of Alabama*, 357 U. S. 449 (1958), and the related decisions in *NAACP* v. *Button*, 371 U. S. 415 (1963), and *Gibson* v. *Florida Legislative Investigation Committee*, 372 U. S. 539, 546 (1963).

In *Button*, this Court cited as examples of "orderly group activity protected by the First and Fourteenth Amendments" the decision in *Thomas* v. *Collins*, 323 U. S. 516 (1945), involving the efforts of a union official to organize workers, and the associating of various railroads to petition legislation, *Eastern Railroad Presidents' Conference* v. *Noerr Motor Freight, Inc.*, 365 U. S. 127, 137-8 (1961). In *Gibson*, this Court declined to require the production of membership records where this might result in a "substantial abridgement of associational freedom."

In *Bates* v. *City of Little Rock*, 361 U. S. 516, 523, 528 (1960), it was said:

> "And it is now beyond dispute that freedom of association for the purpose of advancing ideas and airing grievances is protected by the Due Process Clause of the Fourteenth Amendment from invasion by the States."

and Mr. Justice Black concurring, added:

> "One of those rights, freedom of assembly, includes of course freedom of association; and it is entitled to no less protection than any other First Amendment right. * * * These are principles applicable to all people under our Constitution irrespective of their race, color, politics or religion."

This freedom of association based on personal belief is at the heart of the "concept of neutrality" defined by this Court in the recent school prayer case, *School District of Abington Township, Pennsylvania* v. *Schempp*, 374 U. S. 203, 225-6 (1963).

It is that concept of total neutrality which the State of Virginia has embodied in establishing educational freedom of choice. The State, morally if not legally bound to the providing of an education to the children of its citizens regardless of "their race, color, politics or religion" has, we submit, reasonably accomplished these ends by even handed support of any form of education the individual wants. That 99% of these children continue to attend their local public schools is a source of pride to the State since this now the result of a free choice.

For these reasons, we submit that the scholarship aid legislation of Virginia is clearly non-discriminatory and makes available a freer exercise of the freedoms guaranteed by the First Amendment.

IV

The Petitioners Make No Case for a General Review of the Scholarship Aid Program in Virginia

Petitioners concede that tuition grants are "not unconstitutional per se" (Pet. Br., p. 13). They further concede such statutes are only unlawful to the extent that they are "used to effectuate an illegal or unlawful end" (*ibid.*) Having once accepted this, it is not clear on what basis petitioners then claim general relief going beyond "illegal" application which the record might disclose. Certainly, no one of the authorities cited by peti-

tioners holds invalid a statute "not unconstitutional per se" merely because of a particular misuse.

How, then, do petitioners support their prayer to this Court for a broad assertion of unconstitutionality of all laws involving the use of "public funds * * * for the direct or indirect support of any public or private school which practices racial discrimination" (Pet. Br., p. 3)? It is common knowledge that the organization supporting the petitioners' appeal in this case has publicly asserted that the schools of northern cities are *"de facto"* segregated and that their school boards "practice racial discrimination." Do petitioners here pray a declaration of unconstitutionality of the expenditure of any further funds for the education of children in these public schools of New York, Cleveland, or Boston?

To take a second analogy, it is equally clear that many, if not most, of the private schools of the United States are non-profit educational institutions which receive tax remission and other state benefits such as those discussed in the *Everson* and *Cochran* cases (*supra*, p. 21). Are petitioners here seeking a general declaration of unconstitutionality as to all such laws?

The unlimited scope of petitioners' prayer is, we think, the best argument in favor of the position of the City of Charlottesville in this brief, namely, that whatever use or misuse of any state or local laws may have been made in Prince Edward County, a general extension of that consideration beyond the four corners of the case before the Court opens a Pandora's box whose limits can hardly be explored. If it be true that tuition grants might be used by students to go to a segregated school in Prince Edward County, it is equally clear that many students have taken tuition grants in order to attend integrated

schools in Charlottesville and elsewhere in and out of the State. In fact, at any given time, it could possibly be demonstrated that scholarship aid was principally being used by the recipients as a procedure to increase the degree of integration in the schools of the State.

We suggest that the statement of the issue in the amicus curiae brief of the Government (Gov. Br., p. 2) more properly limits the issue to:

> "Whether the system of tuition grants and tax credits, as it operates in Prince Edward County, constitutes State support of segregation in education. * * *"

Our agreement with this more limited approach is tempered only by the failure of Government counsel to distinguish between the tax credits and other effects of the ordinances issued by the County Board on July 18, 1960 (R. 108), on the one hand, and the state statutes applying to tuition grants, on the other. About the former, many contentions are made in the briefs of the principal parties; whereas, the language of the latter gives no basis to suggest either support for, or question of, geographical or individual discrimination.

On only one point must we take serious issue with the Government's argument supporting the petitioners' case. In Footnote 34 of the Government brief (page 34), we believe the Government has misread the decision of the Supreme Court of Appeals of Virginia in *Almond* v. *Day*, *supra*. What *Almond* v. *Day* held was that the Virginia State Constitution prohibited the State's paying tuition to any pupil attending *any* private school—not a particular private school, integrated, segregated or otherwise. The decision refers to private schools *as a class*. The distinc-

tion is of major significance. That scholarship aid grants made by the State of Virginia will be used by many of the recipients in *some* private school is unquestionable. It is therefore correct for any court to say that Virginia funds will ultimately benefit some private schools. That such funds must be used or even will be used in any particular school cannot be determined in advance.* As we have pointed out, the State's assistance cannot even be applied for until the school-pupil relationship has previously been established. Neither the *Burton* nor the *Simkins* case cited by the Government (Gov. Br., p. 35) are in point on this. In those cases, the funds were earmarked for and then directly used to create the specific segregated activity complained of. Here, it can hardly be said on either the facts or the legislative history that tuition grants in Virginia are intended to benefit any particular school. This is essentially the point we have made in Part II above.

Our disagreement with the Government on this point is most important. It goes to the very heart of the issue we raise. The complete difference between the State acting affirmatively on the one hand to establish, support, maintain or otherwise assist an unlawful activity—as found in *Burton* and *Simkins*—is the direct opposite of Virginia's Scholarship Aid program which was enacted as a complete abandonment of any further affirmative action by the State in requiring any child to attend any particular school.

* Limiting the local contribution to local schools in the July 18, 1960, ordinance in Prince Edward County may raise some question under the language of the State statute and regulations.

V

The Special Objections of the Church Schools Have No Basis in the Rulings of this Court

The church school amicus Citizens for Educational Freedom (CEF), argues that the tuition plan must be all or nothing. To support this point they make two basic errors, one of fact, one of law.

CEF first argues, without citation of authority, that the Virginia Scholarship Aid program (CEF Br., p. 9):

> "• • • despite a substantially different outlook, cannot be considered apart from its directly evasive antecedents. However much we might have hoped otherwise, it had its genesis in massive resistance, and this psychology has clearly governed its operation in Prince Edward County."

We are agreed that this legislation has a substantially different outlook (see the quotations from the Perrow Commission's Report, *supra*, pp. 3, 4); and we have avoided making any suggestion as to what "psychology" may have governed its operations in Prince Edward County.

With the balance of the conclusion of the brief writer, however, we most certainly take issue. As with the petitioners, much space has been devoted to the "massive resistance" legislative period in the State of Virginia. Substantially no acknowledgment has been made of the fact that it was not the Federal but the State Courts which invalidated that legislation. No reference has been made in either brief to the report of the Perrow Commission, the Governor's acceptance of their recommendations, or the Legislature's enactment of their proposals. Not

only was massive resistance left behind in the Supreme Court of Appeals of Virginia, but the opposite concept of affirmatively forbidding the State to take any position or to make any distinction on the basis of race or color was adopted as a fundamental policy of the Commonwealth.

That policy is exemplified and carried out in the Scholarship Aid statutes. While it is understandable that CEF should properly oppose a limitation to "non-sectarian" schools, it is not understandable why it should have to do so on the basis of incomplete facts.

As to the familiar legal point which CEF raises, the matter is simply not an issue before this Court. If it were we would only point out that CEF has failed to distinguish between the permissible sectarian supports illustrated by *Cochran* and *Everson*, *supra*, and the entirely different nature of the participation involved in the *Schempp* case, *supra*, and in *Illinois ex rel. McCollum* v. *Board of Education*, *supra*.

Conclusion

In 1959 Virginia embarked on a new era in the annals of American education. It became the first American state to adopt what might be called individual freedom of education. Such a freedom is that of association on the part of the child, of thought on the part of his parents. It is a step toward individualism in an age of conformity. The educational possibilities now available to the citizens of the City of Charlottesville are many times greater than they were before 1959. In retrospect and in prospect, the principle of open educational option seems to have much

to commend it. It is non-discriminatory and involves no form of state compulsion or direction. If its validity is considered to be at issue in this case, then we ask the Court to sustain it.

Respectfully submitted,

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Appendix A

CODE OF VIRGINIA,
1950, as amended
(1962 Cum. Supp.)

CHAPTER 7.3.

GRANTS FOR EDUCATIONAL PURPOSES

Article 1.

State and Local Scholarships for Education of Children.

Sec.

22-115.29. Policy of Commonwealth; findings.

22-115.30. What children eligible and entitled to State scholarships; amounts.

22-115.31. Appropriations by local governing bodies authorized.

22-115.32. What children eligible and entitled to local scholarships; amounts.

22-115.33. Rules and regulations of State Board of Education.

Sec.

22-115.34. Payment of local scholarships where local governing body fails to provide therefor.

22-115.35. Wrongfully obtaining or expending scholarship funds.

Article 2.

Local Educational Grants.

22-115.36. Authority of counties, cities and towns to appropriate and expend funds for educational purposes.

22-115.37. Limitation of powers conferred.

Article 1.

State and Local Scholarships for Education of Children.

§ 22-115.29. Policy of Commonwealth; findings.—The General Assembly, mindful of the need for a literate and informed citizenry, and being desirous of advancing the cause of education generally, hereby declares that it is the policy of this Commonwealth to encourage the education of all of the children of Virginia. In furtherance of this objective, and to afford each individual freedom in choosing public or private schooling, the General Assembly finds that it is desirable and in the public interest that scholarships should be provided from the public funds of the State for the education of the children in nonsectarian private schools in or outside, and in public schools located outside, the locality where the children reside; and that counties, cities and towns, if the town be a separate school district approved for operation, should be authorized to levy taxes and appropriate public funds to provide for such scholarships. (1960, c. 448.)

§ 22-115.30. What children eligible and entitled to State scholarships; amounts.—Every child in this Commonwealth between the ages of six and twenty who has not finished or graduated from high school, and who desires to attend a nonsectarian private school located in or outside, or a public school located outside, the locality in which such child resides shall be eligible and entitled to receive a State scholarship in the amount of one hundred and twenty-five dollars per school year, if attending an elementary school and one hundred fifty dollars if attending a high school. (1960, c. 448.)

§ 22-115.31. Appropriation by local governing bodies authorized.—The governing body of each county, city or town, if the town be a separate school district approved for operation, is authorized to appropriate funds to provide local scholarships in such amount as they may deem proper, not less than the amount specified in this article, for the education of children residing therein, in nonsectarian private schools located in or outside, and in public schools located outside, such county, city or town. (1960, c. 448.)

§ 22-115.32. What children eligible and entitled to local scholarships; amounts.—Every child between the ages of six and twenty, residing in any county, city, or town which provides for the payment of local scholarships under the provisions of this article, who has not finished or graduated from high school, and who desires to attend a nonsectarian private school located in or outside, or a public school located outside, such county, city, or town, shall be eligible and entitled to receive such local scholarship. The amount of the scholarship, if provided, shall be at least that amount which, with the addition of the State scholarship of one hundred and twenty-five dollars or one hundred and fifty dollars as provided by § 22-115.30 of this article, would equal two hundred and fifty dollars if the child attends an elementary school, or two hundred seventy-five dollars if the child attends a high school, or the amount equal to the actual cost of tuition at the school attended by such child, or the total cost of operation, excluding debt service and capital outlay, per pupil in average daily attendance in the public schools of the county, city, or town providing such scholarships, as

determined by the Superintendent of Public Instruction for the school year in which public schools were last operated in such locality, whichever of such three sums is the lowest. (1960, c. 448.)

§ 22-115.33. Rules and regulations of State Board of Education.—The State Board of Education is hereby authorized and directed to promulgate rules and regulations for the payment of such scholarships, and the administration of this article generally. Such rules and regulations may prescribe the minimum academic standards that shall be met by any nonsectarian private school attended by a child to entitle such child to a scholarship, but shall not deal in any way with the requirements of such school concerning the eligibility of pupils who may be admitted thereto. The State Board of Education may also provide for the payment of such scholarships in installments, and for their proration in the case of children attending school less than a full school year. (1960, c. 448.)

§ 22-115.34. Payment of local scholarships where local governing body fails to provide therefor.—If the governing body of a county, city, or town authorized by § 22-115.31 of this article to provide local scholarships fails to provide such scholarships for those entitled thereto, the State Board of Education shall authorize and direct the Superintendent of Public Instruction, under rules and regulations of the State Board of Education, to provide for the payment of such scholarships on behalf of such county, city, or town to the extent hereinafter mentioned. In such event the Superintendent of Public Instruction shall, at the end of each month, file with the State Comptroller and with the governing body and school board of such county, city, or town a statement showing

all disbursements so made on behalf of such county, city, or town, and the Comptroller shall, from time to time, as such funds become available, deduct from other State funds appropriated for distribution to such county, city or town the amount required to reimburse the State for expenditures incurred under the provisions of this section, provided that in no event shall any funds to which such county, city, or town may be entitled under the provisions of Title 63 of the Code or for the operation of public schools be withheld under the provisions of this section. (1960, c. 448.)

§ 22-115.35. Wrongfully obtaining or expending scholarship funds.—It shall be unlawful for any person to obtain, seek to obtain, expend, or seek to expend, any scholarship funds for any purpose other than in payment of or reimbursement for the tuition costs for the attendance of his child or ward at a nonsectarian private school in or outside the county, city, or town making such scholarship grant, or a public school located outside such county, city, or town. A violation of this section shall except for offenses punishable under § 18.1-273 of the Code, constitute a misdemeanor and be punished as provided by law. (1960, c. 448.)

Article 2.

Local Educational Grants.

§ 22-115.36. Authority of counties, cities and towns to appropriate and expend funds for educational purposes.—Notwithstanding any provision of law limiting the power of counties, cities or towns to levy taxes and to appropri-

ate funds for educational purposes, and in addition to the powers granted such counties, cities or towns under other provisions of law, to levy taxes and appropriate funds for educational purposes, the governing body of any county, city or town is hereby authorized and empowered to appropriate and expend funds of the county, city or town for educational purposes in furtherance of the elementary and secondary education of children between the ages of six and twenty years residing in such county, city or town, under such uniform regulations, in such amounts, and to such persons, associations or corporations as the governing body of such county, city or town may, by ordinance, provide. (1960, c. 461.)

§ 22-115.37. **Limitation of powers conferred.**—No other statute heretofore or hereafter enacted by the General Assembly shall be construed to limit the powers thus conferred, except and unless said statute expressly refers to this article. (1960, c. 461.)

Appendix B

REGULATIONS OF THE STATE BOARD OF EDUCATION

Governing

PUPIL SCHOLARSHIPS

(Adopted June 28, 1963)

In accordance with provisions, Act of Assembly, 1960 Session, the following regulations are hereby adopted, for the 1963-64 fiscal year.

The regulations are applicable in all counties, cities, and towns operating as separate school districts and jointly owned and operated schools in Virginia.

Availability of Pupil Scholarships

Scholarships will be available for pupils of legal school age who are eligible to attend the public schools in the county, city or town in which the parent, guardian or such other person standing in loco parentis is a bona fide resident. (Pupils reaching their 20th birthday during the school term may receive pupil scholarship aid for the remainder of the term for which such aid has been approved, assuming all other eligibility requirements are met.)

Pupil Scholarships can be approved for use in:

1. A public school in a county, city or town other than the county, city or town in which the pupil resides, within the confines of the United States.

2. Non-sectarian private schools within the confines of the United States.

3. Schools referred to in Items 1 and 2 above when meeting minimum requirements prescribed hereinafter by the State Board of Education.

Pupil Scholarships cannot be approved for use:

1. In sectarian schools.

2. In kindergarten or any grade classifications not recognized in the normal eleven year or twelve year system in Virginia schools.

3. In commercial business schools.

4. In colleges or technical schools.

5. For home study courses, correspondence courses, extension classes, or summer schools.

6. For pupils whose tuition has been paid by local school boards which have entered into an agreement for the exchange and/or transfer of such pupils on a contractual tuition basis.

7. For the school year during which a pupil is suspended or expelled.

Amount of Pupil Scholarships

The total amount of each scholarship shall be:

1. The actual amount expended by the parent, guardian, or other person standing in loco parentis to such child, for tuition only at a non-sectarian private school, or a public school in a locality other than the locality in which the child would normally attend,

OR

2. The total cost of operation (not including capital outlay and debt services) per pupil in average daily

attendance in the public schools for the locality making such grant as determined for the fiscal year immediately preceding the year in which the scholarship is paid,

OR

3. $250.00 for pupil attending elementary school; $275.00 for pupil attending high school,

Whichever of such three sums is the lowest.

Payment of Scholarships

Except when the State Board of Education is acting under Section 22-115.34 of the Statutes, scholarship applications will be processed by local school boards and payment made in two equal installments for the school year on the basis of the submission of properly executed forms, which forms are described elsewhere in these regulations. Proration of payment shall be made for less than a full term.

The first installment shall be payable as soon as practicable in the discretion of local school board after the submission of satisfactory evidence of enrollment and attendance in a private non-sectarian school, or in a public school in a locality other than the locality in which the child would normally attend; the second to be payable at the end of the fifth month of the school term for which the scholarship has been approved, or any time during the second term in the discretion of the local school board.

On the basis of an approved application, the school board shall authorize payment for the amount of the approved applications for scholarship aid at such times as are stated above. These checks so issued shall be made payable to the parent, guardian, or other person standing

in loco parentis, and delivered to such person. **Such pupil scholarships should not be paid from public school funds.**

In the event local funds are not provided for the payment of the locality's share of such pupil scholarship, the local school board will receive and process applications; such applications will then be forwarded to the State Board of Education for payment as provided by Section 22-115.34 Acts of Assembly, 1960 Session.

Eligibility of Pupil Scholarship Recipients

Pupil scholarships shall be payable to the parent, guardian, or other person standing in loco parentis for the attendance of a child or children in a private nonsectarian school, or in a public school in a locality other than the locality in which the child would normally attend, which school shall meet the following minimum requirements:

1. The teacher or teachers can establish eligibility under the State Board of Education's certification regulations, including provisions for Special License.

2. The facilities meet local requirements for health and safety, subject to the provisions of the Acts of Assembly, 1960 Session.

3. Enrollment shall not be less than 20 pupils of legal school age.

4. The duration of the school term shall not be less than 180 teaching days.

5. The length of school day shall not be less than five hours for those pupils for whom scholarship aid is requested, except that a school day of not less than 3 hours may be approved upon request, for the schools for mentally retarded children.

6. (a) The elementary school curriculum shall include the following subjects as a minimum: Spelling, reading, writing, arithmetic, English, geography, health, drawing, civics, history of Virginia and history of the United States.

(b) The high school curriculum shall include the following subjects as a minimum: English (4 years), math. (1 year), history and government (2 years), and science (1 year). Additional elective credits must be offered in order to total 16 units for graduation.

Schools for Mentally Retarded Children

Schools for mentally retarded children shall comply with items one through five (as listed above) of the requirements for all schools and in addition, meet the following minimum standards:

a. Mentally retarded children shall be grouped according to the classifications (1) trainable, and (2) educable. Separate classes shall be maintained for each of these classifications.

b. There shall be one teacher for every ten children identified as trainable and one teacher for every sixteen children identified as educable. (Minimum enrollment for the school shall be twenty pupils.)

c. The classes for trainable children shall provide for: training in self care, including health, safety, and personal grooming; participation in group and family living; development of simple work habits and skills; and vocabulary development for participation in simple conversation.

d. The instructional program for educable shall emphasize the achievement of simplified skills of reading, writing, and arithmetic within the scope of the child's mental capacity; provide training in prevocational skills; and the development of acceptable personal traits and qualities.

The local school board, or the State Board of Education when acting under Section 22-115.34, shall determine when such minimum requirements have been met.

Final Dates for Filing Applications

Applications for the first semester shall be filed not later than November 15 of each school year and applications for the second semester shall be filed not later than March 15 of each school year.

Applications for Pupil Scholarships

Each applicant requesting a pupil scholarship shall execute an affidavit which shall include, but not be limited to, the following information:

1. (a) Name of child

   (b) Sex, race and birth date

2. Name and address of parent, guardian, or other person standing in loco parentis

3. Name and address of school last attended and grade

4. Name and address of school in which child, for whom application for scholarship is made, has been accepted

   Name of principal, headmaster, or other administrative head

   Grade to which pupil has been assigned

   Number of actual teaching days such school is scheduled for operation

5. The parent, guardian, or other person standing in loco parentis of such child or children agrees to furnish the Division Superintendent of Schools such information as he may require concerning the attendance of such child or children receiving scholarship aid.

6. The parent, guardian, or other person standing in loco parentis agrees to refund such scholarship payment if the pupil fails to attend school regularly.

7. The parent, guardian, or other person standing in loco parentis shall certify that the scholarship is requested for the sole purpose of paying tuition at a private non-sectarian school, or at a public school in a locality other than the locality in which the child would normally attend, and shall furnish proof of the child's attendance.

8. If scholarships are sought, obtained, and/or expended for any purpose other than those set forth in the statutes, then such parent, guardian, or other person standing in loco parentis shall be punishable by Section 18-237 of the Code of Virginia.

Reimbursement to Local School Boards:

The State Board of Education will reimburse local school boards for the State's share of such scholarship payments as prescribed by statutes. Reimbursement by the State shall be requested on forms prescribed by the Superintendent of Public Instruction. Such reimbursement shall be claimed by Jan. 1, for the first semester and June 1 for the second semester.

APPENDIX C

Form P. S. 2-7-1-63-15M sets

APPLICATION FOR PUPIL SCHOLARSHIP

1963-64

1. Name of child _____

   Sex _____ Race _____ Date of Birth _____ Age _____

2. Name of parent or guardian _____

   Address _____ Phone _____
   City or Town

3. Name and address of school last attended _____

   School Year _____ Grade _____ Public ☐ Private ☐

4. Name of school in which applicant for scholarship has been enrolled for 1963-64

   _____

   Address _____
   City or Town

   Public ☐ Private ☐

   Name of principal, headmaster or other administrative head _____

   Grade to which applicant has been assigned for 1963-64 _____

   Total cost of tuition not including room and board for school year or total tuition charge for that portion of the year for which the child is enrolled _____ $ _____

   Amount of above tuition actually paid as of date of this application _____ $ _____

   Amount of tuition to be paid _____ $ _____

5. If scholarship funds are made available, I agree

   (1) to furnish the Division Superintendent of Schools with such information as he may request and/or require concerning the attendance of the child for whom scholarship aid is requested.

   (2) to refund such scholarship if the pupil fails to attend regularly.

   (3) to notify the school board of any change in my address or that of the pupil for whom scholarship aid is granted.

6. I hereby certify that the scholarship is requested for the sole purpose of paying tuition at a private non-sectarian school, or public school in a locality other than the locality in which the child would normally attend.

7. I have read the above questions and answers, and I understand that if scholarships are sought, obtained, and/or expended for any purpose other than those set forth in the statutes and regulations of the State Board of Education, I shall be punishable as provided by Section 18-237 of the Code of Virginia.

(Original Copy)

(over)

8. I hereby apply for scholarship aid in the amount of $_____ for the 1963-64 school year, or for the period _____ to _____ (if less than a full year).

_____ _____
Date Signed Signature of Parent, Guardian or other person standing in loco parentis

9.

THE FOLLOWING CERTIFICATE MUST BE EXECUTED BY A NOTARY PUBLIC OR OTHER PERSON AUTHORIZED TO TAKE ACKNOWLEDGMENTS

State of Virginia

County (City) of _____

On this _____ day of _____ 19____

_____
(Name of Parent or Guardian executing this form)

whose name is signed to the foregoing instrument(s), personally appeared before me, acknowledged the foregoing signature to be his, and having been duly sworn by me, made oath that the statements made in the said instrument(s) are true.

My commission expires _____ _____
Notary Public

10.

To the best of my knowledge the pupil for whom this application is made is eligible for a Pupil Scholarship under the regulations of the State Board of Education and the statutes as they relate to the educational and non-sectarian status of the school involved and to the pupil's age, qualification, residence, and attendance. I, therefore, recommend approval of the application in the amount of $_____ *

_____ _____
Date Division Superintendent

_____
County or City

* Note: Please explain provided amount approved.

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FILED
MAR 26 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 592

COCHEYSE J. GRIFFIN, *etc., et al.*,
Petitioners,

v.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, *et al.*,
Respondents.

MOTION BY THE CITY OF CHARLOTTESVILLE, AS *AMICUS CURIAE*, TO BE PERMITTED TEN MINUTES ORAL ARGUMENT ON THE GENERAL CONSTITUTIONALITY OF VIRGINIA'S TUITION GRANT PROGRAM

The City of Charlottesville, Virginia, appearing as *amicus curiae*, has served and filed its brief herein pursuant to Rule 42(4) of the Rules of this Court, not in support of the claims or defenses of any party with regard to the school situation in Prince Edward County, but solely in support of the constitutionality of the Scholarship Aid program of the State of Virginia.

In our brief, we argue first that the validity of these statutes is not in question on this record, second, that non-discriminatory statutes which give an option to every child to attend any public or private school of his choice

are a constitutional furthering of the individual's First Amendment freedoms of thought and association.

Since the other parties to this appeal must necessarily be principally concerned with the validity of these statutes as applied in Prince Edward County, the City of Charlottesville asks that ten minutes of argument be permitted on these more general constitutional points.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1963

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On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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BRIEF FOR RESPONDENTS, COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, VIRGINIA, AND T. J. McILWAINE, JR., DIVISION SUPERINTENDENT OF SCHOOLS OF SAID COUNTY

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BRIEF FOR RESPONDENTS, COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, VIRGINIA, AND T. J. McILWAINE, JR., DIVISION SUPERINTENDENT OF SCHOOLS OF SAID COUNTY

PRELIMINARY STATEMENT

This brief is filed on behalf of the respondents, County School Board of Prince Edward County and the Division Superintendent of Schools of that County. Since the beginning of this phase of this case in the summer of 1960, these respondents were represented by Collins Denny, Jr., of Richmond, Virginia, as their chief counsel. It was the firm conviction of Mr. Denny that this case involved some of the most important constitutional questions ever to arise. Though throughout the years involved he was plagued by an illness to which a lesser man sooner would have suc-

cumbed, Mr. Denny dedicated his ability, experience, high principles and health to this now famous struggle in an effort properly to present the constitutional principles to which he was so deeply devoted. Mr. Denny died January 14, 1964, eight days after *certiorari* was granted, and with his death an irreplaceable loss has occurred. Thus it is that his name does not appear on this brief and that he will not be at the bar of this Court when those vital issues are determined.

QUESTIONS PRESENTED

In its *per curiam* opinion granting *certiorari*, the Court put this case down for hearing on the merits "without waiting for final action by the Court of Appeals." For this reason, the School Board assumes that all questions that were before the District Court are now before this Court. In this brief, the School Board will treat the questions involved so far as they relate to the School Board—it will not treat questions that are peculiar to the other respondents. The questions are:

I. Whether the amended supplemental complaint filed by petitioners upon which the proceedings now before this Court are based presents a new and different cause of action from that presented in the original complaint and hence should be dismissed?

II. Whether any action has been taken by respondents which violates any constitutional rights of petitioners?

STATEMENT OF THE CASE

The "Statement" by petitioners is totally inadequate to a proper determination of the issues in this case—thus, a rather lengthy statement by respondents is necessary.

I.

History of the Litigation

As stated by petitioners, this suit was instituted in 1951 in the District Court and was one of the school segregation cases decided in *Brown* v. *Board of Education*, 347 U. S. 483, 349 U. S. 294. Defendants were the County School Board of Prince Edward County and T. J. McIlwaine, Division Superintendent of Schools for Prince Edward County—they were the only defendants.

Petitioners then enumerated the decisions of the District Court and the Court of Appeals which have been rendered since the decision of this Court in *Brown* v. *Board of Education*. Three of the District Court's decisions [142 F. Supp. 616 (1956); 149 F. Supp. 431 (1957); and 164 F. Supp. 786 (1958)] and two of the Court of Appeals' decisions [249 F. 2d 462 (1957) and 266 F. 2d 507 (1959)] were rendered in connection with the implementation of the holding of *Brown* v. *Board of Education*, 349 U. S. 294, and at that time the School Board and the Division Superintendent of Schools were the only defendants.

Subsequent to the last-mentioned decision of the Court of Appeals, 266 F. 2d 507, which was rendered on May 5, 1959, the Board of Supervisors failed to appropriate money to the School Board for the ensuing school year. On April 22, 1960, the petitioners (plaintiffs below) presented to the District Court an order in accordance with the mandate of the Court of Appeals, which order was entered (R. 18).

In June, 1960, petitioners moved the District Court for leave to file a supplemental complaint and to make the Board of Supervisors of Prince Edward County, the State Board of Education and the Superintendent of Public Instruction for the Commonwealth of Virginia parties defendant (R. 2). This motion, though opposed by the original de-

fendants, was granted by the District Court (R. 3), whereupon all defendants, new and old, moved to dismiss the supplemental complaint (R. 4). These motions were never heard. After the lapse of several months, petitioners on January 13, 1961, moved the District Court for leave to file an amended supplemental complaint and to add the Treasurer of Prince Edward County as another party defendant. This motion was granted by order entered April 24, 1961, over the opposition of all who were then defendants (R. 5). Within a week each defendant filed a motion to dismiss the amended supplemental complaint (R. 6), and, in substance, each of those motions was predicted in part on the ground that the amended supplemental complaint alleged a new cause of action different from that alleged in the original complaint, that the relief sought was alien to that sought in the original complaint, that the relief was sought against persons not parties to the original suit and who were foreign to the relief sought therein.[1]

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[1] The amended supplemental complaint prayed for relief against all defendants as follows:

"(a) From refusing to maintain and operate an efficient system of public free schools in Prince Edward County, Virginia;

"(b) From expending public funds for the direct or indirect support of any private school which, for the reason of race, excludes the infant plaintiffs and others similarly situated;

"(c) From expending public funds in aid of, or in reimbursement of money paid for, the attendance of any child at any private school which, for reason of race, excludes the infant plaintiffs and others similarly situated;

"(d) From crediting any taxpayer with any amount paid or contributed to any private school which, for reason of race, excludes the infant plaintiffs and others similarly situated; and

"(e) From conveying, leasing, or otherwise transferring title, possession or operation of the public schools and facilities incidental to the operation thereof in Prince Edward County, Virginia, to any private corporation, association, partnership or individual" (R. 28).

The motion of the School Board further requested that if the motion to dismiss were overruled, at the least all allegations and prayers of the amended supplemental complaint other than those relating to the sale of school properties be dismissed as to the School Board because none of the other allegations and prayers related to it (R. 155).

At this juncture on April 26, 1961, the United States moved the District Court for leave to intervene as a plaintiff; to add as parties defendant the Prince Edward School Foundation, the Comptroller of Virginia, and the Commonwealth of Virginia; and to file a complaint in intervention (R. 128). With one exception the prayers for relief of the complaint in intervention were the same as those of the amended supplemental complaint. That exception was that the United States sought to enjoin the Commonwealth of Virginia, the State Board of Education, the Superintendent of Public Instruction and the State Comptroller "from approving, paying, or issuing warrants for the payment of any funds of the state for the maintenance or operation of public schools anywhere in Virginia for so long as and during such period as the public schools of Prince Edward County are closed * * *." (R.141) In an unreported opinion of June 14, 1961 (R. 162), the District Court refused to allow intervention by the United States. It there recognized that the question whether an injunction should issue restraining the State from expending funds for the maintenance of public schools anywhere in Virginia so long as such schools remained closed in Prince Edward County was not in the case (R. 173). Speaking of the question raised by the complaint in intervention, the District Court said:

> "These are not questions of law or fact in common with the main action. To the contrary, they are new

> and independent assertions, which admittedly are not alleged in the amended supplemental complaint." (R. 174)

Also on June 14, 1961, the District Court overruled the motions of the School Board and other defendants to dismiss the amended supplemental complaint without prejudice to their right to renew them upon the conclusion of the hearing on the merits which was set for July 24, 1961 (R. 159). The motions were so renewed (R. 198).

On August 23, 1961, the District Court rendered an opinion—*Allen* v. *County School Board*, 198 F. Supp. 497 (R. 52)—in which it held that several sections of the Virginia Constitution and statutes required interpretation before it could answer the following question:

> "Can the public schools, heretofore maintained in Prince Edward County, be closed in order to avoid the racial discrimination prohibited by the Fourteenth Amendment?"

The District Court therefore deferred its ruling on that question until the Supreme Court of Appeals had passed upon the matter (R. 57, 58). Further, it enjoined the payment of state and local tuition grants so long as the public schools in Prince Edward County remained closed (R. 62, 64). Finally, upon a finding that there was no evidence that the School Board had leased or transferred or intended to lease or transfer school property, the prayer for injunctive relief relating thereto was denied (R. 65, 67).

A petition for mandamus was filed by petitioners in the Supreme Court of Appeals of Virginia against the Board of Supervisors seeking to compel it to appropriate sufficient funds for the operation and maintenance of public schools

in the County, the Board of Supervisors filed its answer, the District Court reviewed the pleadings and in its order of November 16, 1961, held that an "appropriate suit" had been timely instituted seeking a determination of the question posed in the opinion of August 23, 1961 (R. 66).

As stated by the Court of Appeals, plaintiffs then "aborted the effort to have the relevant question decided by the state courts" when they, in their brief in the mandamus proceeding, "disclaimed the presence of any federal question." *Griffin* v. *Board of Supervisors*, 322 F. 2d 332 (1963) at page 334 (R. 212). In light of that disclaimer, the Supreme Court of Appeals of Virginia decided only the question of state law. It held that under Section 136 of the Constitution of Virginia it is discretionary with the Board of Supervisors whether it will make an appropriation to the School Board for the maintenance and operation of schools. It also held that mandamus will not lie to compel the Board of Supervisors to exercise that discretion in favor of an appropriation. *Griffin* v. *Board of Supervisors of Prince Edward County*, 203 Va. 321, 124 S.E. 2d 227 (1962).

On May 1, 1962, all defendants moved the District Court to dismiss the amended supplemental complaint or, in the alternative, to further abstain until plaintiff submitted to the Supreme Court of Appeals of Virginia the question which it previously had withdrawn from that court (R. 117).

Also on May 1, 1962, the School Board and the Division Superintendent of Schools renewed their motions to dismiss, which motions the District Court had not yet determined. They further moved that the amended supplemental complaint be dismissed as to them on the ground that it contained no allegation against the Division Superin-

tendent and that the District Court had already held [2] that there was no evidence to support the only allegation against the School Board—namely, that it was contemplating the lease or transfer of public school property (R. 202).

On May 18, 1962, the above motion was argued (R. 14). The court indicated that it would not dismiss the amended supplemental complaint as to the School Board, whereupon the School Board moved for summary judgment in its favor upon Section V (Paragraph 16) of the said amended supplemental complaint—that being the section in which the contemplated sale or transfer of school property was alleged. The court granted that motion and by order entered May 24, 1962, it dismissed Section V of the amended supplemental complaint and directed the clerk to enter final judgment in favor of the School Board on that cause of action (R. 69).

On July 25, 1962, the court rendered an opinion in which it held:

> "* * * that the public schools of Prince Edward County may not be closed to avoid the effect of the law of the land as interpreted by the Supreme Court, while the Commonwealth of Virginia permits other public schools to remain open at the expense of the taxpayers." *Allen* v. *County School Board*, 207 F. Supp. 349, at page 355 (R. 80).

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[2] In its opinion of August 23, 1961, the District Court held:

> "There is no evidence the School Board of Prince Edward County has leased or transferred or intends to lease or transfer any school property. The prayer for injunctive relief is therefore denied" (R. 65).

In its order of November 16, 1961, the District Court held:

> "There being no evidence that the School Board of Prince Edward County has leased or transferred or intends to lease or transfer any school property, the plaintiffs' prayer for injunctive relief is denied" (R. 67).

In that opinion of July 25, 1962, the court denied defendants' motion to abstain until plaintiffs brought the proper questions before the state courts so the School Board filed a petition for declaratory judgment in the Circuit Court of the City of Richmond raising the pertinent questions. The defendants again asked the District Court to defer until the courts of the Commonwealth passed on those questions. This motion was denied by opinion and order entered October 10, 1962 (R. 82). (The word "order" was omitted from the caption in the printing.)

Also on October 10, 1962, the court entered an order in accordance with its opinion of July 25, 1962. The appeal to the Court of Appeals for the Fourth Circuit followed.

The opinion of the Court of Appeals is found at 322 F. 2d 332, and in the printed record at page 209. So far as the School Board is concerned, that court held: The School Board "has received no funds with which it could operate schools" (R. 211); there "was no evidence that any one had any idea the school buildings and property owned by the School Board would be sold or leased" (R. 213); that the Prince Edward School Foundation "has used none of the facilities of the School Board" (R. 214); and that the "Plaintiffs' theory may also be summarily dismissed insofar as it is viewed as a contention that the closure of the schools was a violation of the order of the District Court entered in compliance with the direction of this [Fourth Circuit] Court" (R. 215). It explained the latter holding by saying:

> "The injunctive order, entered when the School Board and its Division Superintendent were the only defendants, required them to abandon their racially discriminatory practices. Without funds they have been powerless to operate schools, but, even if they had pro-

> cured the closure of the schools, they would not have violated the order for they abandoned discriminatory admission practices when they closed all schools as fully as if they had continued to operate schools, but without discrimination." (R. 215)

The Court of Appeals held that the principal issues raised by the amended supplemental complaint required an interpretation of the Virginia Constitution and statutes by the Supreme Court of Appeals of Virginia. It then vacated all the judgments of the District Court with instructions to abstain until the case of *County School Board* v. *Griffin*, then pending before the Virginia Supreme Court of Appeals, was decided, "with leave" to the District Court thereafter to take such action as would then be appropriate in light of the determination of the state law. *Griffin* v. *Board of Supervisors*, *supra*, 322 F. 2d at page 336 (R. 228).

On December 2, 1963, the Supreme Court of Appeals handed down its opinion which is reported as *County School Board* v. *Griffin*, 204 Va. 650, 133 S.E. 2d 565. That decision will be discussed more fully hereafter.

At this point reference should be made to the statement of petitioners on page 4 of their brief. This statement forms the real basis of their case under the amended supplemental complaint. That statement is:

> "Despite the prolixity of judicial pronouncements in ten long years of litigation, Dorothy Davis and an entire generation of Negro children of public school age have forever lost *their constitutional rights to a public school education unimpaired by the burden of racial discrimination.*" (Emphasis supplied.)

By that statement of the alleged rights of petitioners, and similar statements contained elsewhere in their brief, peti-

tioners attempt to pull themselves up by their own bootstraps. True it is "that racial discrimination in public education is unconstitutional." *Brown* v. *Board of Education*, 349 U. S. 294, at page 298. But it has never been held that there is a constitutional right to a public school education. As will be discussed hereafter, this question, to which petitioners assume the answer, should not be decided in this case.

II.

Facts Relative to the School Board

In the last decision of the Court of Appeals prior to the filing of the amended supplemental complaint and the addition of new parties defendant, and at a time when the School Board and the Division Superintendent of Schools were the only defendants—*Allen* v. *County School Board*, 266 F. 2d 507 (May 5, 1959)—the Court of Appeals held at page 511:

> "* * * that the District Judge issue an order enjoining the defendants from any action that regulates or affects on the basis of color the admission, enrollment or education of the infant plaintiffs, or any other Negro children similarly situated, to the *high schools operated by the defendants in the County;* * * * (Emphasis supplied.)

Up until that time and thereafter through the 1958-59 school term, the School Board operated public schools in Prince Edward County. In the spring of 1959—and of every year subsequent thereto until the present—pursuant to state law, the Division Superintendent of Schools with the advice of the School Board prepared and submitted to the Board of Supervisors an estimate of the amount of money

needed for support of public schools and, in the alternative, an estimate of the amount of money needed for educational purposes in the County for the next school year. Upon the basis of those estimates the Division Superintendent requested the Board of Supervisors to make the necessary levy or appropriation for the operation of public schools or for educational purposes. The foregoing was done in compliance with Sections 22-120.3 and 22-120.4 of the Code of Virginia. *County School Board* v. *Griffin, supra,* 204 Va. at page 654, 133 S.E. 2d at page 568. See also exhibits 12, 13 and 14, filed in proceedings of July 24-27, 1961, in District Court (Tr.[3] 46, 47). On June 3, 1959, the Board of Supervisors refused the request of the School Board to make such levy or appropriation, thus leaving the School Board without funds with which to operate public schools for the 1959-60 school year. The requests of the School Board for 1960-61, 1961-62 and 1962-63 school years were likewise refused, rendering the School Board powerless to operate schools. *Griffin* v. *Board of Supervisors, supra,* 322 F. 2d at pages 334, 336 (R. 211, 215). Thus, the public schools have remained closed.

This Court should be cognizant of the fact that the School Board has been deeply concerned that a substantial segment of the children of the County have been without schools. It has made its properties available to any responsible group for use by these children.

The record shows that in June, 1961, the School Board offered to the Virginia Teachers Association (an association of Negro school teachers) the public school buildings of the County, buses, utilities, and janitorial services for the use by the Virginia Teachers Association without cost

[3] Transcript of trial proceedings, July 24-27, 1961.

in an educational program that it was going to conduct (R. 178). That offer was rejected (Tr. 370, 371).

Petitioners have mentioned that on "the initiative of the United States, formal educational opportunities are now being made available to these [Negro] children in the County * * *" (Petitioners' brief, page 7). Previous offers by the white citizens of Prince Edward County to assist in such undertaking were rejected.[4] So the truth of the matter is that the United States, through a special assistant to the Attorney General[5] acted as a catalyst in bringing together various interests and, further, enduced the Negro people of the County to avail themselves of private educational facilities. These schools are being conducted and operated in buildings owned by the School Board of the County which have been made available for use of the Prince Edward Free School Association, together with buses and other equipment. The School Board receives from the Association only a sum estimated to cover the cost of insurance, maintenance, repairs and janitorial services. The trustees of the Association are six Virginia educators—three Negro and three white.

III.

The Virginia System

The decisions of the Supreme Court of Appeals of Virginia conclusively settle the relative duties and obligations of the respondents with respect to the nature of the Virginia system of education. *Griffin* v. *Board of Supervisors*, 203

[4] The Court of Appeals found that the Negro citizens of Prince Edward County "declined proffered assistance" in providing schools for their children. *Griffin* v. *Board of Supervisors*, 322 F. 2d 332, at page 335 (R. 214).

[5] William J. vanden Heuvel.

Va. 321, 124 S.E. 2d 227 (1962); *County School Board* v. *Griffin*, 204 Va. 650, 133 S.E. 2d 565 (1963). However, a somewhat detailed analysis of this system is necessary to a proper determination of the powers and duties of the School Board and Division Superintendent. And a determination of these powers and duties must be made in order properly to decide whether the actions of these respondents violate any constitutional rights of petitioners.

The Constitution and laws of Virginia contain provisions which enable a locality to establish, maintain and operate public schools if it so desires, and they also make provision to further and strengthen the "liberty" of parents and children in educational matters of which this Court spoke so eloquently in *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925), by providing scholarship grants to assist parents in educating their children elsewhere.

The Virginia Plan therefore envisions much more than public schools in those localities which may desire to have them. Under the permissive authority of Section 141* of the Constitution, the General Assembly has made an appropriation for education purposes in furtherance of elementary and secondary education of Virginia students in public and in non-sectarian private schools other than those owned or exclusively controlled by a county or city or town. This it has done by enacting Sections 22-115.29, *et seq.*, of the Code of Virginia (1950), as amended, and by certain items of the Appropriation Acts.

These sections of the Code provide a state scholarship grant for *each* child desiring to attend a non-sectarian private school or a public school outside the locality in which he resides. They permit local governing bodies to appropriate

* The pertinent sections of the Virginia Constitution are set forth in an appendix hereto.

funds to provide local scholarships and, if a local governing body makes no such provision, the Superintendent of Public Instruction under regulations of the State Board provides for such payment. In that event, a like amount is deducted from state funds appropriated for distribution to that county, provided that no deduction is made from funds available to the locality for operation of public schools or for welfare. In addition, a locality may make appropriation for educational purposes in furtherance of the education of its children under uniform regulations as it, by ordinance, may provide. Such an ordinance was that adopted by the Board of Supervisors of Prince Edward County on July 18, 1960 (R. 108), designated in this proceeding as an ordinance "in aid of education."

Appropriations for the state scholarship grants are made to the Governor of Virginia, not to the State Board of Education.

It thus appears that the State itself unconditionally establishes State aids, and enables local aids, to Virginia's children in obtaining educational advantages in private, nonsectarian schools wherever located and also in public schools outside the residence of the child. Also the State has set up a system for public schools pursuant to which any locality that desires may establish, maintain and operate public schools and subject to varying conditions the State will assist therein.

A.

THE VIRGINIA PLAN FOR PUBLIC SCHOOLS

An analysis of the Constitution of the Commonwealth of Virginia, the statutes adopted pursuant thereto, and decisions of the Supreme Court of Appeals of Virginia will clearly demonstrate that the public schools in Virginia are not and have not since 1902 been established, maintained

and operated by the State but rather by the political subdivisions of the State. This analysis will further demonstrate that within each political subdivision the governing body has the absolute responsibility and authority to determine the amount, if any, of local funds which shall be appropriated for school purposes and the local school board has the absolute responsibility and authority to determine how those funds shall be expended for school purposes.

Though the genesis of public schools in Virginia was in 1796 under the influence of Thomas Jefferson (Buck, *The Development of Public Schools in Virginia 1607-1952*, page 27), it was not until the Constitution of 1869 that serious attempt was made to establish them. The provisions of that Constitution dealing with schools were substantially incorporated into the Constitution of 1902, the present Constitution, with one important exception. The Constitution of 1869 did not preserve to the localities the primary voice in establishing, maintaining and operating such schools as they might think proper. Thus the vital difference between the Constitution of 1869 and that of 1902 is that the latter makes localities autonomous subdivisions where basic school matters are concerned. In discussing the sections of the 1902 Constitution reference will be made to some of the significant changes from the 1869 Constitution to illustrate that difference.

We begin with Section 129 of the Constitution of 1902 which provides:

> "The General Assembly shall establish and maintain an efficient *system* of public free schools throughout the State." (Emphasis supplied.)

That section on its face is not self-executing but requires legislation to carry it into effect. *County School Board* v. *Griffin*, *supra*, 204 Va. at 660, 133 S.E. 2d at 573. Accord-

ingly had the General Assembly failed to establish a "system," the courts would have been powerless to compel action by it or to inaugurate a system themselves.

But the General Assembly has not failed to carry out the mandate of Section 129. It has adopted a school code which is now found in Title 22 of the Code of Virginia and by the adoption thereof it has complied with the requirements of the Constitution. It was specifically so held in *Scott County School Board* v. *Board of Supervisors*, 169 Va. 213, 193 S.E. 52 (1937), cited in *County School Board* v. *Griffin*, *supra*:

> "The Constitution provides that it shall be the duty of the General Assembly to provide and maintain the public school system (Constitution, Section 129), and the General Assembly has complied with that requirement by the enactment of a School Code, * * *." (169 Va. at page 215, 193 S.E. at page 53.)

The School Code of which the court spoke in the case just cited was in all substantial features the School Code which we have today.

Thus, the highest court in Virginia has held the mandate of Section 129 to have been met by the adoption of the School Code. It is therefore clear that the *Constitution* of Virginia does not require the establishment, maintenance, or operation of a single school any place in the State—it only requires the establishment and maintenance of a "system." Nor does the *School Code* require the establishment, maintenance or operation of any school anywhere—it does, however, provide the "system" for the establishment, maintenance and operation of schools throughout the State. *County School Board* v. *Griffin*, *supra*, 204 Va. at pages 660, 667, 133 S.E. 2d at pages 572, 577. This duty and power imposed and conferred by Section 129 was

spoken of by the Chief Justice of Virginia in a concurring opinion in *Almond* v. *Giles*, 188 Va. 1, 49 S.E. 2d 431 (1948), as

> "the plenary power of the legislature *to provide the means to maintain and establish* an efficient public school *system.*" (Emphasis supplied.)

The other sections of the Constitution of Virginia pertaining to schools bear out and are consistent with this conclusion.

Section 130 provides:

> "The general supervision of the school *system* shall be vested in a State Board of Education, * * *." (Emphasis supplied.)

Section 133 provides:

> "The supervision of *schools* in each county and city shall be vested in a school board, * * *." (Emphasis supplied.)

A provision similar to Section 130 was contained in the Constitution of 1869 (Art. VIII, Sec. 1), but it did not contain a provision similar to Section 133. This latter section in the Constitution of 1902 therefore imposes a duty on *local* officials not theretofore imposed.

Section 132 of the Constitution imposes four duties upon the State Board of Education other than the general duty of general supervision of the school system imposed by Section 130. They are to (1) divide the State into school divisions and to certify to the local school board a list of eligible persons for the position of Division Superintendent of Schools; (2) manage and invest the school (literary) fund under regulations provided by law; (3) make rules and

regulations for management and conduct of schools as the General Assembly may prescribe; and (4) select textbooks and educational appliances for use in the schools.

There is no duty on the State Board to establish, maintain or operate schools.

We turn now to the sections of the Constitution that contain the provisions relative to school funds. First, there is Section 135 which sets aside moneys from three sources "to the schools of the primary and grammar grades for the equal benefit of all the people of the State to be apportioned on the basis of school population." These funds, hereafter called "constitutional funds," are the only moneys which the Constitution of Virginia *requires* to be devoted to the public schools and their use is restricted to the "primary and grammar grades." During the school year 1960-61, Prince Edward's portion of this fund was $39,360.00. That section also provides:

> "and the General Assembly shall make such other appropriations *as it may deem best*, to be apportioned on a basis to be provided by law." (Emphasis supplied.)

Clearly, the above-quoted language is discretionary.

Section 136 of the Constitution deals with local school funds and provides in part that the local political subdivision

> "is authorized to raise additional sums by a tax on property * * * to be apportioned and expended by the local school authorities of said counties, cities, towns and districts *in establishing and maintaining such schools as in their judgment the public welfare may require.*" (Emphasis supplied.)

Under this portion of Section 136 the locality has the power to raise additional funds for school purposes by local taxation. Under the Constitution of 1869, localities had this

power (Art. VIII, Sec. 8). Also under Section 136 the local school board has the exclusive authority to determine what schools shall be established and maintained and for what the school moneys shall be used. Under the Constitution of 1869 the localities had no such authority.

It has always been very clear in Virginia that no locality was under any obligation to levy any local tax for schools or to appropriate one dollar for schools. If there had ever been any doubt on that subject, that doubt was removed by *Griffin* v. *Board of Supervisors of Prince Edward County*, 203 Va. 321, 124 S.E. 2d 277 (1962), wherein it was held that there is no obligation or duty upon the governing body of a locality to levy any tax or appropriate any money for school purposes.

The only limitation on the exercise by the local school board of its judgment is that:

> "Such primary schools as may be established in any school year shall be maintained at least four months of that school year before any part of the fund assessed and collected may be devoted to the establishment of schools of higher grade." (Section 136, Constitution of Virginia.)

We previously pointed out that Section 135 of the Constitution provides that the General Assembly, in addition to the constitutional funds, which it must appropriate, may make other appropriations for school purposes as it may deem best. Pursuant to this power, the General Assembly has enacted Code Section 22-119 which provides that moneys received from the "Forest Reserve Act" shall be apportioned and paid to the treasurer of each county who shall "place the funds to the credit of the public schools of his county." Under this section Prince Edward received $2,644.40 for the school year 1960-61.

Thus the School Board of Prince Edward County receives from the constitutional funds and forest reserve funds irrespective of any action taken by the Board of Supervisors an amount of money totally inadequate to operate schools. *County School Board* v. *Griffin, supra*, 204 Va. at 664, 133 S.E. 2d at 575.

Since the Constitution of Virginia does not require the Board of Supervisors to appropriate money to the School Board (*Griffin* v. *Board of Supervisors*, 203 Va. 321, 124 S.E. 2d 227 (1962)), there are no funds, save the ones just mentioned, available to the School Board to establish, maintain and operate public schools in Prince Edward County if the Board of Supervisors fails or refuses to make a levy and appropriation for school purposes. This is true with respect to funds for the construction of schools and funds for the operation and maintenance of schools.

Since this case does not involve construction of schools, it is sufficient to point out that not even the General Assembly of Virginia can direct a board of supervisors to levy taxes for school purposes or direct that a particular school be erected. The Supreme Court of Appeals of Virginia so held in *School Board of Carroll County* v. *Shockley*, 160 Va. 405, 168 S.E. 419 (1933), wherein it considered the validity of an Act of the General Assembly directing the imposition of certain local taxes, the proceeds of which were to be used by the school board in erecting a particular school. The court held that this act violated Section 136 of the Constitution in two particulars. First, it pointed out that it is for the local governing body to determine what sums, if any, should be raised by local taxation for school purposes, and, second, it pointed out that it is for the school board to determine what schools shall be established and maintained. The holding in that case was reaffirmed in

County School Board v. *Griffin*, 204 Va. 650, 133 S.E. 2d 565 (1963).

Funds appropriated by the General Assembly for use by the local school boards in establishing, maintaining and operating schools are appropriated only upon condition that the board of supervisors of a county or council of a city, as the case may be, has raised and appropriated certain local moneys for school purposes—in other words, to "match" funds—and on condition that certain things be done in the management and operation of the schools. Unless the local governing body—the body directly responsible and responive to the people of the locality—desires that there be public schools in the locality and is willing to use local funds to further that purpose, the local school authorities are powerless to carry on public schools. They cannot borrow money on a long term basis without the approval of the qualified voters of the locality—Constitution, Section 115a; they cannot make temporary loans without approval of the local governing body—Code Section 22-120.

That state moneys, other than the "constitutional funds" and moneys derived from the "Forest Reserve Act," are apportioned only on a conditional or a matching basis is demonstrated by the uncontradicted testimony of J. G. Blount, Jr., who has been connected with the State Department of Education for more than thirty years and is Director, Division of Administration and Finance (Tr. 466). He is the official of the Department of Education who deals with state appropriations for educational purposes. After reviewing the Appropriation Act of 1960, which was similar to the Acts under which funds have ever been appropriated to school boards, (Tr. 488), he testified that no state money other than the two funds just mentioned are available to a locality for the operation of public schools save on a conditional or a matching basis—that schools be

operated and there be, as a condition precedent, local effort (Tr. 477, *et seq.*)

This plan of making state funds available to the autonomous local school boards only upon a matching basis is no new thing and was not done to meet the conditions created by the school segregation decisions. It is a plan which has been in effect in Virginia for approximately forty years. *County School Board* v. *Griffin, supra,* 204 Va. at page 665, 133 S.E. 2d at page 576.

A county school board cannot require the Board of Supervisors to provide funds for the operation of schools. Under the Code of Virginia the Division Superintendent does have the duty to prepare annually and submit to the Board of Supervisors, with the advice of the School Board, estimates of the amount needed for the support of public schools or for educational purposes in the county (Code Section 22-120.3) and to request the Board of Supervisors to fix a levy or make such appropriation as will provide therefor (Code Section 22-120.4). But the School Board cannot *compel* the Board of Supervisors to provide such funds. That was settled in *Griffin* v. *Board of Supervisors of Prince Edward County,* 203 Va. 321, 124 S.E. 2d 227 (1962), which held that it was within the uncontrolled discretion of the Board of Supervisors whether a levy or appropriation would be made for school purposes.

It may therefore accurately be stated that under the Constitution and statutes of Virginia, which long antedate the school litigation, the County Board of Supervisors, the local legislative body, determines whether the School Board shall have money with which to establish, maintain and operate the schools. If it makes money available for that purpose, the School Board alone determines within the limits of the budget it presented to the Board of Supervisors how those moneys shall be spent. *Board of Supervisors of*

Chesterfield County v. *School Board of Chesterfield County*, 182 Va. 206, 28 S.E. 2d 698 (1944).

Though the provisions of the Constitution and statutes dealing with the financing of school operations are clearly the key to local autonomy with regard to public schools in Virginia, this plan of local autonomy is carried out in the provisions for the *operation* of the schools.[6]

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[6] The following statutes from Title 22, Code of Virginia (1950), as amended, illustrate this fact:

1. The power to determine the length of the school term is vested solely in the local school board, for Code Section 22-5 provides:

> "The school board of each county and city in the state is empowered to maintain the public free schools of such county and city for a period of at least nine months * * *."

That it may set the term at less than nine months or for no period at all is made clear by further language in that section which says that if the schools are operated for a term less than nine months any state appropriations shall be reduced proportionately.

2. Teachers are selcted and employed by the local school boards (Code Section 22-203).

3. The local school board determines the salary of the teachers (Code Section 22-72). It does not have to follow any minimum schedule established by the State—despite a finding to contrary by the District Court in the order of October 10, 1962.

4. The division superintendent is elected by the local school board pursuant to Section 133 of the Constitution and Code Sections 22-32 and 22-33.

5. Code Sections 22-233, *et seq.*, establish certain fundamental subjects to be taught and other subjects are determined by the local school board.

6. From a list of suitable textbooks prepared by the State Board, the local board selects those to be used (Section 132 of the Constitution and Code Section 22-296).

The local school board may withdraw from the statutes dealing with textbooks (Code Section 22-318).

7. Final power in connection with suspension or expulsion is vested in the local school board (Code Sections 22-230, 22-231).

Therefore, local authorities not only control and determine whether there shall be any schools and if so what schools there shall be, they also determine the extent, if any, to which the schools will be supported and maintained. If schools are to be operated, certain subjects must be taught and teachers with certain qualifications are to be employed. The State stands by, through the State Board of Education, to give advice and assistance, but the operation of the schools lies with the locality. Indeed, the fundamental duty of the State Board is expressed in Section 22-21 of the Code of Virginia to be:

> "* * * to do all things necessary to *stimulate* and *encourage* local supervisory activities and interest in the improvement of the elementary and secondary schools * * *." (Emphasis supplied.)

This places upon the State Board the right to "stimulate and encourage"—not the right to "operate and control."

There is no section of the Constitution or statutes of Virginia which authorizes any state official or any state agency to go into a county and open or operate a public school. The Superintendent of Public Instruction testified (Tr. 115):

> "There is no provision in law which would authorize the State Board of Education to start operating public schools in any county or city."

It is therefore clear that the Commonwealth has no voice in determining whether schools are to be established or maintained. If local authorities desire schools to be established and maintained and make provisions therefor and

operate them in a certain way, then state funds are available to assist.

This is the Virginia system and the courts of the Commonwealth have so held.

SUMMARY OF ARGUMENT

1. The cause of action alleged by petitioners in their supplemental and amended supplemental complaints, the latter of which was filed in the spring of 1961 and is the pleading upon which this phase of the case is based, is a new and different cause of action from that alleged in the original complaint. The cause of action alleged in the original complaint pertained to the constitutionality of segregation in the public schools operated by the respondent County School Board—a cause of action properly asserted against the School Board as the defendant. The cause of action alleged in the amended supplemental complaint pertains to the question whether taxes must be levied and funds appropriated for the operation of schools in the County—a cause of action which is *not* properly asserted against the School Board or the Division Superintendent of Schools. The School Board has stated that it will operate schools in the County should funds be made available to it (R. 79).

That the question raised by the amended supplemental complaint was not involved in the original case or decided by the courts in the original case is made clear when it is recognized that the schools of the County had been closed for almost a year at the time the District Court entered its order of April 22, 1960, restraining these respondents from racial discrimination in "the high schools operated by the defendants in the County * * *" (R. 18).

The law is clear that a party may not inject a new cause of action into a pending suit, nor may he seek relief of a different kind or on a different principle, by supplemental pleadings. The reason for this is likewise clear—to avoid the very confusion and disorder that is found in the instant case. As a direct result of the confusion and disorder here present, the courts below have not considered the question that is now before this Court—namely, can or should a federal court compel a local governing body to levy taxes and appropriate funds for the operation of public schools. Because of the importance of that question it should not be decided by this Court until the lower courts have had full opportunity to give mature consideration to it with the benefit of briefs and argument by the parties.

2. More particularly, nothing contained in the suit at this point is related to the respondents, School Board and Division Superintendent of Schools. They are guilty of nothing which violates the injunction of the District Court of April 22, 1960 or which violates any constitutional rights of petitioners. In fact, there are no direct allegations against them in the amended supplemental complaint save that dealing with their alleged intention to dispose of school property. That allegation was dismissed by the District Court and the Court of Appeals in effect affirmed the District Court on that point, Petitioners make no reference to that point in their brief so it is assumed that they have abandoned it.

So far as the other allegations of the petitioners are concerned—those dealing with funds for the operation of schools and tuition grants—it is clear that these respondents have no duties or powers with respect to them. Therefore, it is their position that this phase of the suit should be dismissed as to them and that no orders should be entered against them.

ARGUMENT

I. The Amended Supplemental Complaint Filed by Petitioners Upon Which the Proceedings Now Before this Court Are Based Presents a New and Different Cause of Action from that Presented in the Original Complaint and Should Be Dismissed.

At every stage of the phase of this suit initiated by petitioners' supplemental and amended supplemental complaint, all respondents vigorously and repeatedly asserted that those so-called "supplemental" pleadings alleged and stated a new cause of action from that stated in the original pleadings and hence should have been dismissed. This point was raised by objection to the filing of such complaints and by motions to dismiss after they were filed—and the objections and motions were fully briefed and argued before the trial court. That court on July 7, 1961—a year after the question was first raised by respondents—entered an order overruling the motions without prejudice to respondents to renew them at the conclusion of the hearing (R. 182). The motions were so renewed and were overruled by the court upon entry of the order of October 10, 1962 (R. 83). No reason for such action was ever given by the District Court.

Of course, it is necessary to determine the nature of the original cause of action and the relief obtained thereon before it is possible to determine whether the supplemental pleadings allege a *new* cause of action and seek new and different relief. This was never done by the District Court in spite of respondents' repeated efforts to have it so do. Such determination is important, indeed absolutely necessary, because the supplemental pleadings of the petitioners alleged that the

> "action, inaction and contemplated action of each and all defendants was, has been, and will be taken for the sole purpose of circumventing and frustrating the enforcement of the order of the court requiring the racial desegregation of the public schools of Prince Edward County * * *." (Par. 17 of the Amended Supplemental Complaint.) (R. 27)

It is elementary that before a determination can be made of whether certain action or inaction "circumvents" or "frustrates" an order, or renders it "unenforceable" and "ineffective" (Par. 11 of the Amended Supplemental Complaint) (R. 25), it is essential that the meaning of that order be ascertained. If the action or inaction of the respondents does not and cannot in fact circumvent or frustrate the enforcement of it, or does not and cannot render it unenforceable and ineffective, then petitioners are entitled to no relief upon their allegations and prayers. Yet, in spite of respondents' continued efforts to get the trial judge to make this basic determination and to state it, he refused so to do. Rather, he proceeded throughout upon the implied assumption that the order of April 22, 1960, would be violated—for actionable "circumvention" and "frustration" can be nothing else than "violation"—by the closing of the schools in Prince Edward County. It is inconveivable that a complaint predicated upon the alleged violation of an order could be decided without a judicial determination of the meaning of that order. We submit that a mere reading of the order of April 22, 1960 (R. 18), is sufficient to reach the conclusion that it does not require that any public school be operated in Prince Edward County. By that order it was decreed:

> "That the defendants * * * be, and they hereby are, restrained and enjoined from any action that regulates

> or affects on the basis of race or color the admission, enrollment or education of the infant plaintiffs, or any other Negro children similarly situated, *to the high schools operated by the defendants in the County* * * *." (Emphasis supplied.)

This is the order described in paragraph 17 of the amended supplemental complaint as "requiring the racial desegregation of the public schools of Prince Edward County" (R. 27). Petitioners contended that this order required the operation of public schools in Prince Edward County for by prayer (a) of the amended supplemental complaint they asked that defendants be enjoined

> "From refusing to maintain and operate an efficient system of public free schools in Prince Edward County, Virginia." (R. 27.)

We submit that the order of April 22, 1960, did not require the operation of schools in the county but only restrained segregation in such schools that *were* operated. If a mere reading of this plain and unambiguous order is not enough to satisfy this Court of its true meaning, a brief review of the situation as it was prior to and at the time of the entry of the order should do so.

In January, 1957, the District Court recognized that probably the schools would be closed if racial mixing was required. In *Davis* v. *County School Board*, 149 F. Supp. 431, at page 439, the trial judge said:

> "Laying aside for the moment the probability of the schools being closed, in the present state of unrest and racial tension in the county it would be unwise to attempt to force a change of the system until the entire situation can be considered and adjustments gradually brought about."
>
> * * *

> "Action which might cause mixing the schools at this time, resulting in closing them, would be highly and permanently injurious to children of both races."

The Court of Appeals also was aware of this probability for it said on November 11, 1957, in *Allen* v. *County School Board*, 249 F. 2d 462, at page 465:

> "The fact that the schools might be closed if the order were enforced is no reason for not enforcing it."

And the trial court after hearing evidence in regard to conditions in Prince Edward County stated in 1958 in *Allen* v. *County School Board*, 164 F. Supp. 786, at page 789:

> "They expressed apprehension with respect to both violence and the closing of the schools if the motion of the plaintiffs should be granted."

Then on May 5, 1959, the Court of Appeals, with full knowledge that schools might be closed, directed that

> "The District Judge issue an order enjoining the defendants from any action that regulates or affects on the basis of color the admission, enrollment or education of the infant plaintiffs * * * *to the high schools operated by the defendants in the County* * * *." (Emphasis supplied.) (*Allen* v. *County School Board*, 266 F. 2d 507, at page 511.)

Subsequent to that decision in June of 1959, the Board of Supervisors of Prince Edward County refused to levy taxes or appropriate money for public schools, as the result of which the schools did not open in September, 1959.

It was not until April 22, 1960—almost a year after the

Board of Supervisors refused to make a levy or appropriation for public schools and during which time schools were closed, all of which was known to petitioners, the District Court and the Court of Appeals—that at the request of petitioners the order of April 22, 1960, was entered. Had the District Court intended to require the operation of schools in Prince Edward County, it surely would have done so in language clear and unmistakable. As was said in *Haskell* v. *Kansas Natural Gas Company*, 224 U. S. 217 (1912), at page 223:

> "But the decree [*i.e.*, an injunction decree] must be read in view of the issues made and the relief sought and granted."

It is thus clear that until the supplemental pleadings were filed the "cause of action" being prosecuted by petitioners was to obtain an injunction against enforced segregation.

The Court of Appeals on the occasion of the last appeal to it in this case prior to the filing of the supplemental pleadings and the addition of new defendants described the cause of action involved in the original proceedng by stating in 266 F. 2d at page 508:

> "The original complaint was based on the proposition that the segregation of the races in the public schools of a state is a violation of the Federal Constitution * * *."

Upon that question this Court in *Brown* v. *Board of Education*, 347 U. S. 483, pronounced, at page 495:

> "* * * that plaintiffs * * *, are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment."

"Cause of action" is defined as referring "to the specified conduct of the defendant upon which plaintiff bases his claim for relief." *Popovitch* v. *Kasperlik*, 76 F. Supp. 233 (W. D. Pa. 1947), at page 238. It is apparent that the petitioners, the District Court, the Court of Appeals, and this Court have all recognized that the specified conduct of the respondents School Board and the Division Superintendent of Schools from which relief was sought in the original proceedings was the *enforced* segregation of the races *in the public schools* of Prince Edward County.

By their supplemental pleadings petitioners seek relief form a new and different "specified conduct of the defendant"—namely, from the failure to maintain and operate public schools in Prince Edward County. Recognizing that this failure could not be attributed to any action or inaction of the original defendants, petitioners (plaintiffs below) added four new defendants: The Board of Supervsors of Prince Edward County, the State Superintendent of Public Instruction, the State Board of Education, and the County Treasurer.

In an attempt to seek some supplemental relief from the original defendants and thus supply a connection between the original cause of action and the new cause of action, petitioners alleged that the County School Board was contemplating a conveyance, lease or transfer of the public schools and public school property and asked that it be enjoined from doing so. Such allegation, even if true, and the prayer for relief based upon that allegation, is not supplemental to the original proceedings which did not seek to compel the operation of public schools. That allegation was not true and there was no evidence to support it. Upon the County School Board's motion for summary judgment upon this allegation contained in Section V, paragraph 16 of the amended supplemental complaint (R. 26), the District Court dismissed

it by order of May 24, 1962 (R. 69). That was the only allegation of the amended supplemental complaint against either of the original defendants. There was no allegation against the Division Superintendent of Schools.

Therefore, the amended supplemental complaint seeks entirely new and different relief from entirely new and diferent "specified conduct" than that alleged by the original complaint, and, further, seeks it from entirely new and different defendants. This, we submit, is not permitted by Rule 15(d) of the Federal Rules of Civil Procedure under which petitioners proceeded. In *Chicago Grain Door Co.* v. *Chicago,* 137 Fed. 101 (7th Cir. 1905) at page 103, it was stated:

> "Jurisdiction to entertain such a complaint can only be granted where it is desired to aid or effectuate a prior decree or to seek relief, not of a different kind or on a different principle, but on the same lines as the original bill."

In *Ebel* v. *Drum,* 55 F. Supp. 186 (Mass. 1944), it was held that a supplemental pleading should not be allowed when it presents "a controversy of a substantially different nature, involving far different factual and legal considerations" from that of the original cause.

Upon the question of the availability of supplemental pleadings to effectuate a prior decree of the court, which petitioners claim is necessary here, this Court said in *Dugas* v. *American Surety Co.,* 300 U. S. 414 (1937), at page 428:

> "The jurisdiction to entertain the supplemental bill is free from doubt. Such a bill may be brought in a federal court in aid of and to effectuate its prior decree to the end either that the decree may be carried fully into execution or that it may be given fuller effect, *but*

> *subject to the qualification that the relief be not of a different kind or on a different principle.*" (Emphasis supplied.)

If the public schools were being operated in Prince Edward County and if any action of the respondents were regulating or affecting on the basis of race or color the admission, enrollment or education of the infant petitioners, a supplemental complaint would be entirely proper. But it is not proper when public schools are not being operated and the issue raised by the supplemental pleadings is whether they must be operated. The relief sought by the supplemental complaint is of a different kind and on a different principle than that of the original suit and should be litigated in a separate and independent suit. The reason a new cause of action should not be injected by supplemental pleadings is stated in *U. S.* v. *Southern Pac. Co.*, 75 F. Supp. 336 (Ore. 1947), at page 339:

> "A new and distinct law suit should never be injected into a case by filing a supplemental pleading. This rule is inherent in all systems of pleading, common law, code or federal. It is required by the necessities. Confusion would otherwise result."

The confusion of which the Court spoke in *U. S.* v. *Southern Pac. Co., supra*, has been present in the instant case from time the amended supplemental complaint was filed until today. The positions taken by the petitioners, by the United States and by the District Court have not been unlike the magician's rabbit—"Now you see it, now you don't." Instead of the case coming to this Court based on the firm foundation of mature decisions of the District Court and the Court of Appeals, made with the position of

the petitioners being clearly stated and respondents' defenses thereto, it comes here grounded on quicksand.

First, in the original suit, petitioners sought an injunction against racial discrimination in the public schools operated by the School Board. Then, by their amended supplemental complaint, petitioners sought to enjoin the School Board and the Division Superintendent of Schools, together with various new defendants, from refusing to maintain and operate public free schools in the County—in effect a mandamus (R. 27).

When the case arrived in the Court of Appeals a third position was taken by petitioners. There they asked that the State Board of Education, one of the new defendants, be enjoined "from approving the payment of state funds for the support of public education anywhere in the State so long as public schools in Prince Edward County remain closed."

Now, in this Court they ask that "the respondents" (which respondents they do not identify) be enjoined "from failing to take the necessary steps—*i.e.*, levying the required taxes and appropriating sufficient funds for the operation of the public schools in Prince Edward County * * *"—again, the mandamus approach.

The holdings of the District Court have been equally elusive. The ultimate question decided by the District Court in its order of October 10, 1962 (R. 83), was not whether petitioners were being discriminated against in the public schools of Prince Edward County which would have been a proper queston in this case. It was not even whether respondents could be enjoined from refusing to maintain and operate public free schools in Prince Edward County—in effect a mandamus—which was the question raised by the amended supplemental complaint. The question that was decided by the District Court was whether the public schools

of Prince Edward County may be closed while other public schools in the State remain open, and the "specified conduct" of the respondents is allegedly that of allowing other schools of the Commonwealth to remain open while those of Prince Edward are closed, conduct which by no stretch of the imagination can involve the two original defendants. It is clear that the School Board of Prince Edward County and its Division Superintendent have not a scintilla of a voice in determining whether or how schools be operated elsewhere.

And it was decided in spite of the memorandum opinion of June 14, 1961 (by which the United States was denied leave to intervene in this case), in which the District Judge recognized and held that the *amended supplemental complaint did not seek to enjoin the expenditure of state funds* "for the maintenance of free public schools throughout the rest of Virginia so long as the free public schools of Prince Edward County remain closed" (R. 173).

Further, in that same opinion, referring to the fact that by its complaint in intervention the United States did seek to so enjoin the payment of state funds, the District Judge stated:

> "These are not questions of law or fact in common with the main action. To the contrary, they are *new and independent assertions, which admittedly are not alleged in the Amended Supplemental Complaint.*" (Emphasis supplied.) (R. 174)

The position of the United States has likewise varied from stage to stage of this suit. When it sought to intervene in the District Court, it sought to close public schools throughout Virginia until the schools of Prince Edward County were opened. Then in the Court of Appeals and now in this

Court it takes a different position—namely, that the Board of Supervisors should be compelled to levy taxes and appropriate money for school purposes.

The question whether a federal court can compel a local legislative body to levy taxes and appropriate money for public school purposes is among the most important and far-reaching questions ever to come before this Court—it goes to the very vitals of our federal system of government. It now is thrust upon this Court without having been briefed, argued or considered by the District Court or the Court of Appeals. True it is, as this Court said in its *per curiam* opinion granting *certiorari* in this case, that the questions presented are of great importance. This is all the more reason for it not to be decided by this Court until it has been properly pleaded, briefed, argued and decided by the courts below.

It is late in the proceeding for the case to be dismissed on this ground, but such is not the fault of respondents. Each of them has raised the question fully and fairly at every stage possible and proper. The regrettable state of the case results directly from the failure of the District Court to keep the case within the scope and bounds prescribed by a proper application of the Rules. Had the District Court considered these motions to dismiss the amended supplemental complaint for the reasons stated, the ultimate question would undoubtedly have been before this Court long before now in such posture that it properly could have been decided. That the District Court failed to so act is no reason to deprive respondents of that to which they are entitled. These respondents respectfully urge this Court to meet this issue. If it will, respondents submit that the Court will then dismiss the amended supplemental complaint even at this late stage.

II. No Action Has Been Taken By Respondents Which Violates Any Constitutional Rights of Petitioners

The Fourteenth Amendment to the Constitution of the United States provides in part:

> "No state shall * * * deny to any person within its jurisdiction the equal protection of the laws." *U. S. Const.* amend. XIV, § 1.

Brown v. *Board of Education*, 347 U. S. 483 (1954), held:

> "In each of the cases, minors of the Negro race * * * seek the aid of the courts in obtaining admission to the public schools of their community on a nonsegregated basis. In each instance, they had been denied admission to schools attended by white children under laws requiring or permitting segregation according to race. (347 U. S. at page 487)
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> * * *
>
> "Therefore, we hold that the plaintiffs * * * are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment." (347 U. S. at page 495)

Allen v. *County School Board*, 266 F. 2d 507 (4th Cir. 1959), required:

> "* * * that the District Judge issue an order enjoining the defendants from any action that regulates or affects on the basis of color the admission, enrollment or education of the infant plaintiffs, * * * to the *high schools operated by the defendants* in the County; and requiring the defendants to receive and consider the applications of such persons for admission to the white high school of the County on a non-racial basis without regard to race or color; * * * and also requiring the

School Board to make plans for the admission of pupils in the *elementary schools of the County* without regard to race and to receive and consider applications to this end at the earliest practicable date." (Emphasis supplied.) (266 F. 2d at page 511)

The order of the District Court entered April 22, 1960, on the mandate contained in 266 F. 2d 507, above, provided:

"2. That the defendants, * * * be, and they hereby are, restrained and enjoined from any action that regulates or affects on the basis of race or color the admission, enrollment or education of the infant plaintiffs, * * * to the *high schools operated by the defendants in the County* and that the defendants receive and consider the applications of such persons for admission to such high schools without regard to race or color.

"3. That the defendants make plans for the admission of pupils in the *elementary schools of the County* without regard to race or color and to receive and consider applications to this end at the earliest practicable day." (Emphasis supplied.) (R. 18)

The rules under which this case must be fought are thus drawn—the basic, fundamental, constitutional provision and the interpretation of it as applied to these respondents. Reduced to simplicity, if these respondents have *violated* the rules that have been formulated by the courts as set out above—then this Court should so hold. If these respondents have not *violated* the rules—then this Court should so hold.

The question is not whether the rules have been circumvented or frustrated—the question is have they been violated. Has the School Board of Prince Edward County or T. J. McIlwaine, Division Superintendent of Schools taken

"any action that regulates or affects on the basis of race or color the admission, enrollment or education" of petitioners to the "high schools operated by" the School Board? Have they failed "to receive and consider the applications of such persons for admission to *such* high schools without regard to race or color"? (Emphasis supplied.) Have they failed to "make plans for the admission of pupils in the elementary schools of the County without regard to race or color and to consider applications to this end * * *"?

If the answer to any one of these questions is in the affirmative, then these respondents have violated the rules. If the answer to each question is in the negative, there has been no violation. The same is true with respect to the other respondents.

The answer to each of these questions must be in the negative—from the moment the District Court entered its order of April 22, 1960, no racial segregation has been enforced in Prince Edward County. That order did not say that public schools must be operated and that in the operation thereof there should be no segregation enforced by law. Petitioners assume an unwarranted interpretation of that order and then use it as the premise upon which to base their case. If words mean what they say, that effort must fail.

So far as these respondents are concerned—the original defendants—it is crystal clear that there is nothing charged against them in the case as it now stands before this Court. The only allegation against either of them in the amended supplemental complaint is found in Section V, paragraph 16 (R. 26)—that pertaining to the "intended" disposition of school property by the School Board. As heretofore shown the District Court granted the motion of the School Board for summary judgment as to the cause of action there alleged and entered an order dismissing it (R. 69).

In effect, the Court of Appeals affirmed the District Court on this point. *Griffin* v. *Board of Supervisors, supra, 322* F. 2d at page 335 (R. 213).

So the bridge which petitioners sought to construct between the original cause of action and the new cause of action disappears and with it any concrete allegations against the original defendants.

However, throughout the phase of the litigation initiated by the amended supplemental complaint, petitioners have made blanket charges against all respondents—seldom leveling the charge at a specific respondent. It began by paragraph 17 of their amended supplemental complaint (R. 27) and has continued to their brief filed in this Court (p. 14). In paragraph 17 of the amended supplemental complaint petitioners claim respondents have "circumvented and frustrated" rights established by the order of the District Court entered on April 22, 1960; on page 14 of their brief petitioners claim respondents have "defeated and frustrated" a so-called right that has not yet been determined, to-wit: the "right to unsegregated education."

Let us examine the words "circumvent" and "frustrate" so frequently used by petitioners—and also used by the District Court in its opinion of August 23, 1961 (R. 60).

Of course, any action which violates an injunctive order is illegal; an action which does not violate it is permissible. We know of no half-way point. If an action is contrary to the injunction or obstructs the enforcement of it, that action of course violates the order. We so understand the words "circumvent" and "frustrate" in this connection. To charge that actions circumvent and frustrate an injunctive decree and are therefore not permissible is to charge that they violate the decree. If they do not violate the decree, if they are not contrary to that which the decree orders, there is noth-

ing illegal in the actions and they are permissible so far as the decree is concerned.

The petitioners gain nothing by charging that actions circumvent or frustrate a decree—they do not weaken the burden which rests upon them. To sustain their allegation, they must show that the decree has been violated. In this litigation they have taken the position that they may prevail with something less than that. They say, in effect, that if the actions of the respondents, otherwise lawful, prevent the petitioners from reaping all that they had hoped to get from the decree, then the decree is circumvented and those actions, otherwise lawful, may be enjoined even though they do not violate the decree.

In this case, or in any other, the question is not whether petitioners have obtained the relief which they thought they had—it is not even whether they have obtained the relief which this Court, the Court of Appeals or the District Court thought would result to petitioners from their respective opinions and orders. If respondents have "circumvented" or "frustrated" the desires of the petitioners or the expectations of this Court, it does not follow that the decrees of the courts have been circumvented or violated. If such were the test, then we would have a government of men, not a government of laws.

Thus, we submit that this Court should remove and forever put to rest the loose and dangerous terms—circumvent and frustrate—in the field of constitutional interpretation and in the determination of whether an order of a court has been violated.

Though, in this case, the *desires* of petitioners may have been circumvented or frustrated, it is clear that the decrees of the courts and the constitutional rights of petitioners have not been. The decree effectuates today everything

sought by the original complaint and everything provided for by the decree is in effect—an end has been put to segregation in the public schools operated by the School Board. Speaking of the decree of April 22, 1960, the Court of Appeals said that it had not been violated because discriminatory practices were abandoned when the schools were closed (R. 215).

Without doubt, the School Board of Prince Edward County and T. J. McIlwaine, Division Superintendent of Schools of said County, have not done nor failed to do anything which violates any constitutional right of petitioners or which violates the order of any court in this case. Other than the broad assertions against all respondents previously referred to, petitioners in their brief make only three statements that can be construed as relating to these respondents. First, on page 9 of their brief, petitioners state that the District Court directed the School Board to present a plan by September 7, 1962, for the admission of pupils in the elementary and secondary schools for the 1962-63 term. Petitioners further state that "at the September, 1962, hearing, no plans were submitted." That statement is not true—at the hearing on September 7, 1962, the School Board filed a plan, copies of which had been sent to all counsel on August 31, 1962, and the District Court entered an order marking it filed. See page 4 of the Transcript of Proceedings, September 7, 1962.

Second, on page 24, after stating that the Board of Supervisors refused to exercise its authority to support schools, petitioners say:

> "The other respondents have made no attempt to step into the breach."

Suffice it to say, as heretofore pointed out, the School Board possesses no power to step into the breach—in fact, it has done everything it can or is required to do.

Third, on page 34 petitioners state that respondents through a cooperative effort have deprived petitioners of their rights and though the more "obvious intransigence is on the part of the county board of supervisors, their recalcitrance has been aided, abetted and acquiesced in by the local school board * * *." The District Court in its memorandum opinion and order of October 10, 1962 (R. 82), removed the word "acquiescence" from its finding of July 25, 1962, that the action of the Board of Supervisors was taken with the "full knowledge and acquiescence" of the other respondents (R. 76). Thus, the erroneous finding was corrected.

A copy of the page proof of the brief of the United States was received by counsel for these respondents on the day this brief was scheduled at the printers. Thus no response can be made—and none appears necessary so far as these respondents are concerned. Nothing contained in the brief of the United States is directed to the School Board or the Division Superintendent, and no relief is sought against them. And such is true—in spite of the fact that these respondents were the sole defendants in the original case—because they have no power or control over the situation. It is well established that an injunction should not issue against one who has no authority or power to act. *Dawley* v. *City of Norfolk*, 159 F. Supp. 642 (1958), *aff'd.* 260 F. 2d 647 (4th Cir. 1958), *cert. denied* 359 U. S. 935 (1959).

CONCLUSION

For the hereinabove stated reasons, the respondents, County School Board of Prince Edward County and T. J. McIlwaine, Division Superintendent of Schools of said County, respectfully submit that the amended supplemental complaint be dismissed as to all respondents or, at the least, that it should be dismissed as to them.

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Constitution of Virginia, Article IX, Sections 129 through 136 and Section 141

§ 129. Free schools to be maintained.—The General Assembly shall establish and maintain an efficient system of public free schools throughout the State.

§ 130. State Board of Education; composition; vacancies, how filed.—The general supervision of the school system shall be vested in a State Board of Education, to be appointed by the Governor, subject to confirmation by the General Assembly, and to consist of seven members. * * *

§ 131. Superintendent of Public Instruction; appointment; term of office; how elected; duties.—A Superintendent of Public Instruction, who shall be an experienced educator, shall be appointed by the Governor, subject to confirmation by the General Assembly, for a term coincident with that of each Governor making the appointment; * * * provided * * * that the General Assembly shall have power, by statute enacted after January first, nineteen hundred and thirty-two, to provide for the election or appointment of a Superintendent of Public Instruction in such manner and for such term as may be prescribed by statute. * * * The powers and duties of the Superintendent of Public Instruction shall be prescribed by law.

§ 132. Powers and duties of State Board of Education. —The duties and powers of the State Board of Education shall be as follows:

First. It shall divide the State into appropriate school divisions, comprising not less than one county or city each, but no county or city shall be divided in the formation of such divisions. It shall certify to the local school board or boards of each division in the State a list of persons having

reasonable academic and business qualifications for division superintendent of schools, one of whom shall be selected as the superintendent of schools for such division by the said school board or boards as provided by section one hundred and thirty-three of this Constitution.

Second. It shall have the management and investment of the school fund under regulations prescribed by law.

Third. It shall have such authority to make rules and regulations for the management and conduct of the school as the General Assembly may prescribe; but until otherwise provided by law, the State Board of Education may continue existing rules and regulations in force and amend or change the same.

Fourth. It shall select textbooks and educational appliances for use in the schools of the State, exercising such discretion as it may see fit in the selection of books suitable for the schools in the cities and counties, respectively; provided, however, the General Assembly may prescribe the time in which the State Board of Education may change the textbooks.

§ 133. School districts; school trustees.—The supervision of schools in each county and city shall be vested in a school board, to be composed of trustees to be selected in the manner, for the term and to the number provided by law. Each magisterial district shall constitute a separate school district, unless otherwise provided by law, and the magisterial district shall be the basis of representation on the school board of such county or city, unless some other basis is provided by the General Assembly, provided, however, that in cities of one hundred and fifty thousand or over, the school boards of respective cities shall have power,

subject to the approval of the local legislative bodies of said cities, to prescribe the number and boundaries of the school districts.

The General Assembly may provide for the consolidation, into one school division, of one or more counties or cities with one or more counties or cities. The supervision of schools in any such school division may be vested in a single school board, to be composed of trustees to be selected in the manner, for the term and to the number provided by law. Upon the formation of any such school board for any such school division, the school boards of the counties or cities in the school division shall cease to exist.

There shall be appointed by the school board or boards of each school division, one division superintendent of schools, who shall be selected from a list of eligibles certified by the State Board of Education and shall hold office for four years. In the event that the local board or boards fail to elect a division superintendent within the time prescribed by law, the State Board of Education shall appoint such division superintendent.

§ 134. Literary fund.—The General Assembly shall set apart as a permanent and perpetual literary fund, the present literary fund of the State; the proceeds of all public lands donated by Congress for public free school purposes; of all escheated property; of all waste and unappropriated lands; of all property accruing to the State by forfeiture, and all fines collected for offenses committed against the State, and such other sums as the General Assembly may appropriate; provided that when and so long as the principal of the literary fund amounts to as much as ten million dollars, the General Assembly may set aside all or any part of moneys thereafter received into the principal of said fund for public school purposes including teachers retirement

fund to be held and administered in such manner as may be provided by general law.

§ 135. Appropriations for school purposes, school age.—The General Assembly shall apply the annual interest on the literary fund; that portion of the capitation tax provided for in the Constitution to be paid into the State treasury, and not returnable to the counties and cities; and an amount equal to the total that would be received from an annual tax on the property of not less than one nor more than five mills on the dollar to the schools of the primary and grammar grades, for the equal benefit of all the people of the State, to be apportioned on a basis of school population; the number of children between the ages of seven and twenty years in each school district to be the basis of such apportionment. And the General Assembly shall make such other appropriations for school purposes as it may deem best, to be apportioned on a basis to be provided by law.

§ 136. Local school taxes.—Each county, city or town, if the same be a separate school district, and school district is authorized to raise additional sums by a tax on property, subject to local taxation, not to exceed in the aggregate in any one year a rate of levy to be fixed by law, to be apportioned and expended by the local school authorities of said counties, cities, towns and districts in establishing and maintaining such schools as in their judgment the public welfare may require; provided that such primary schools as may be established in any school year shall be maintained at least four months of that school year, before any part of the fund assessed and collected may be devoted to the establishment of schools of higher grade. The boards of supervisors of the several counties, and the councils of the several cities and towns, if the same be separate school districts, shall provide for the levy and collection of such local school taxes.

§ 141. State appropriations prohibited to schools or institutions of learning not owned or exclusively controlled by the State or some subdivision thereof; exceptions to rule.—No appropriation of public funds shall be made to any school or institution of learning not owned or exclusively controlled by the State or some political subdivision thereof; provided, first, that the General Assembly may, and the governing bodies of the several counties, cities and towns may, subject to such limitations as may be imposed by the General Assembly, appropriate funds for educational purposes which may be expended in furtherance of elementary, secondary, collegiate or graduate education of Virginia students in public and nonsectarian private schools and institutions of learning, in addition to those owned or exclusively controlled by the State or any such county, city or town; second * * *; third, that counties, cities, towns and districts may make appropriations to nonsectarian schools of manual, industrial or technical training and also to any school or institution of learning owned or exclusively controlled by such county, city, town or school district.

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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1963

No. 592.

COCHEYSE J. GRIFFIN, et al,
Petitioners,

v.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, et al,
Defendants.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE BOARD OF SUPERVISORS OF PRINCE EDWARD COUNTY

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE BOARD OF SUPERVISORS OF PRINCE EDWARD COUNTY

I.

HISTORY OF THE LITIGATION

This litigation began as *Davis, et al v. County School Board of Prince Edward and T. J. McIlwaine, Division Superintendent of Public Schools.* Under that style it went to the Supreme Court of the United States where it was one of four chool segregation cases decided as *Brown* v.

Board of Education, 347 U.S. 483 (1954). By *Brown* v. *Board of Education*, 349 U.S. 294 (1955), it was remanded. Shortly thereafter it became *Allen, et al* v. *County School Board, etc.* Its purpose was stated in *Allen* v. *County School Board, et al*, 249 F. 2d 462, Fourth Circuit (1957), thus:

> "This action was commenced *to enjoin racial segregation in the public schools* of Prince Edward County, Virginia, on the ground that provisions of the state constitution and statutory code requiring such segregation were violative of the 14th Amendment to the Constitution of the United States and therefore void." (Emphasis supplied)

That purpose was substantially accomplished when the Court of Appeals for the Fourth Circuit handed down its opinion of May 5, 1959—*Allen* v. *County School Board, etc.*, 266 F. 2d 507 (1959), holding as follows:

> "* * * that the District Judge issue an order enjoining the defendants from any action that regulates or affects on the basis of color the admission, enrollment or education of the infant plaintiffs, or any other Negro children similarly situated, to the *high schools operated by the defendants* in the County; and requiring the defendants to receive and consider the applications of such persons for admission to the white high school of the County on a non-racial basis without regard to race or color; and to take immediate steps in this regard to the end that the applications be considered so as to permit the entrance of qualified persons into the white school in the school term beginning September 1959; and also requiring the School Board to make

plans for the admission of pupils in the *elementary schools of the County* without regard to race and to receive and consider applications to this end at the earliest possible date." (Emphasis supplied).

In the spring of 1959 the School Board submitted to the Board of Supervisors of Prince Edward County, under Sections 22-120.3 and 120.4 of the Code of Virginia, its estimate of funds needed for the support of public schools during the next scholastic year and in the alternative the amount of money deemed needed for educational purposes in the County, and requested the Board of Supervisors to fix such school levy as would net the necessary funds or in lieu thereof to make a cash appropriation for the operation of public schools or for educational purposes.

On June 2 and 3, 1959, the Board of Supervisors refused to make any levy or appropriation for public schools or for educational purposes.

The Prince Edward Educational Foundation was organized for the purpose of operating private schools in the County. During the school year 1959-60, the Foundation operated schools in the County, which were attended by most of the white children of the County and which were financed by privately raised funds.

Negro citizens of the County took no steps to provide schooling and spurned all offers of assistance in organizing and conducting schools.

Although the opinion of the Court of Appeals for the Fourth Circuit had been handed down on May 5, 1959, no order was presented for entry until April 22, 1960. That

order (R. 18) enjoined the two defendants, i.e., the County School Board and the Division Superintendent, as follows:

> "2. That the defendants, the County School Board of Prince Edward County, T. J. McIlwaine, Division Superintendent of Schools of Prince Edward County, their agents and employees, and successors in office, and all persons acting in concert with them be, and they hereby are, restrained and enjoined from any action that regulates or affects on the basis of race or color the admission, enrollment or education of the infant plaintiffs, or any other Negro children similarly situated, to the *high schools operated by the defendants in the County* and that the defendants receive and consider the applications of such persons for admission to such high schools without regard to race or color.
>
> "3. That the defendants make plans for the admission of pupils in the *elementary schools of the County* without regard to race or color and to receive and consider applications to this end at the earliest practicable day." (Emphasis supplied).

By the entry of this order the purpose of the litigation was accomplished, permanently enjoining the defendants against considering race in the admission, enrollment and education of children in the schools operated by the defendants. It is important to emphasize that this injunction was in essence purely negative. It did not order the then defendants to operate public schools in the County; it simply prohibited them from taking race into consideration *in the schools operated by the defendants in the County*. That injunction remains in force and has been violated by no one.

Again in the spring of 1960 the Division Superintendent

of Schools submitted on behalf of the School Board estimates required by law and requested the Board of Supervisors to make levy and appropriation for public schools or to provide money for educational purposes. The Board of Supervisors again refused or failed to make a levy and appropriation for the operation of public schools.

At about this time on June 10, 1960 the plaintiffs filed a motion asking leave to file a Supplemental Complaint and to make the Board of Supervisors of Prince Edward County, the State Board of Education and the Superintendent of Public Instruction (a State officer) parties defendant. This motion was opposed by the School Board because the Supplemental Complaint was not in aid of the injunction granted on April 22, 1960, but raised an entirely new cause of action against entirely new parties. By order of September 16, 1960, the District Court granted the motion. Motions to dismiss the Supplemental Complaint were filed by all defendants, both old and new.

In the meanwhile on July 18, 1960, the Board of Supervisors adopted two ordinances, one referred to in this litigation as an ordinance "in aid of education" (R. 108-111). It provided a sum not less than $100.00 per year to be paid to the parent of any child resident of Prince Edward County in aid of the education of such child "in a course of systematic educational instruction or training."

The Board also adopted an ordinance granting a tax exemption to any taxpayer of the County for contributions to non-profit, non-sectarian private schools located within the County, not to exceed 25 per centum of the total tax due by such taxpayer. This latter ordinance was repealed by action of the Board of Supervisors on the 3rd day of

September, 1963, a certified copy of the resolution effecting such repeal is appended to this brief.

The ordinance "in aid of education" remains in full force and effect, payments thereunder having been enjoined.

During the school year 1960-61 the Prince Edward School Foundation operated its schools in the County, charging tuition. The total amount of the tuition was slightly in excess of the aggregate amount available to a parent under the County ordinance "in aid of education" and under the State scholarship grant law contained in Sections 22-115.29 - 22-115.35, inclusive, of the Code of Virginia. During that year the schools of the Foundation were attended by the majority of the white children of the County. The parents of most of those children availed themselves of the County ordinance "in aid of education" and of the State scholarship grant law, though some sought the aid of neither County nor State. Some of the parents of Negro children availed themselves of State tuition grants and County grants in aid of education in order to send their children to school outside the County.

The motions to dismiss the Supplemental Complaint were never heard. The plaintiffs let weeks pass without requesting a date for a hearing, and on January 13, 1961, they filed a motion for leave to file an Amended Supplemental Complaint and add as a further party defendant J. W. Wilson, Jr., Treasurer of Prince Edward County. This motion was opposed by all those who then were parties defendant, and by order of April 24, 1961, the motion was granted.

The allegations of the Amended Supplemental Complaint are set forth R. 20-28.

The injunctions prayed for relief in five (5) particulars, as follows:

1. To enjoin the defendants from refusing to maintain and operate an efficient system of public free schools in Prince Edward County.

2. To enjoin the defendants from expending public funds for the direct or indirect support of any private school which for reasons of race excludes the infant plaintiffs and others similarly situated.

3. An injunction against all defendants from expending public funds in aid or in reimbursement of money paid for the attendance of any child at any private school which for reasons of race excludes the infant plaintiffs and others similarly situated.

4. An injunction against all defendants from crediting any taxpayer with any amount paid or contributed to any private school which for reasons of race excludes the infant plaintiffs and others similarly situated.

5. From conveying, leasing or otherwise transferring title, possession or operation of public schools and facilities in Prince Edward County to any private corporation, association, etc.

It will be noted that the record fails to show that any Negro child has applied for admission to the Prince Edward Foundation schools, and consequently fails to show that any such child has been denied admission to such schools on account of race or otherwise.

It will be noted that the plaintiffs did not ask for an injunction cutting off State aid to other localities in Vir-

ginia which desire to operate public schools, "for so long as public schools remain closed in Prince Edward County".

Within a week following the order of the District Court permitting the Amended Supplemental Complaint to be filed, each defendant filed motions to dismiss.

Each of the said motions was in part predicated upon a ground which was stated by the School Board as follows:

> "Said Amended Supplemental Complaint alleges new causes of action different from that alleged in the original Complaint; the relief sought is alien to that sought in the original Complaint and it is sought against persons not parties to the original suit and who were foreign to the relief sought therein."

Without attempting to be all inclusive, the motions of the several defendants were predicated upon additional grounds as follows:

1. That the Amended Supplemental Complaint is a suit against the State.

2. That it attempted to enjoin as unconstitutional the enforcement of State legislation or constitutional provisions and required a three-judge court.

3. That the doctrine of abstention should be applied.

4. That the order of April 22, 1960, does not require that schools be operated and that no right of the defendant is violated in the refusal of the Board of Supervisors of Prince Edward County to levy taxes and appropriate funds for the operation of public schools.

5. That the District Court was asked to exercise an exclusively legislative power by compelling the local legislative body to levy taxes and appropriate money.

6. That prayer C and D constituted a prayer that the judiciary exercise an affirmative legislative function and in effect amend the tuition grant ordinance and the statutes of the Commonwealth of Virginia in aid of the education of children; and that the injunction prayed under C, D and E violates the negative nature of the Fourteenth Amendment; is an injunction requiring the legislative branch to amend a legislative enactment; is an extension of the Fourteenth Amendment into the area of private individual action and by the granting of said prayers would be an unconstitutional restriction of and violative of freedoms secured to individuals by other provisions of the Constitution of the United States.

Reference is made to the motion of the Board of Supervisors for a complete disclosure of the ground upon which it moved the dismissal of the Amended Supplemental Complaint.

At this stage of the proceeding the Attorney General of the United States filed a motion for leave to intervene as a plaintiff, to add additional defendants, and to file a complaint in intervention. He sought to add as parties defendant the Prince Edward School Foundation, the Comptroller of Virginia, and the Commonwealth of Virginia. With one exception the prayers of relief in that intervention complaint were the same as those in the Amended Supplemental Complaint. That one exception was that the Attorney General of the United States sought an injunction against the

Commonwealth of Virginia, the State Board of Education, the Superintendent of Public Instruction, and the State Comptroller to restrain them from approving, paying or issuing warrants for the payment of any funds of the State for the maintenance or operation of public schools anywhere in the State so long as public schools in Prince Edward are closed. By memorandum opinion of June 14, 1961, which is unreported, but a copy of which is in the record (R. 162), the District Court denied the motion of the United States Attorney General. In that opinion the District Court pointed out that the facts in the Prince Edward litigation did not justify a comparison with those in Little Rock and in New Orleans, for, said the District Court (R. 167):

> "There has been no known defiance of this Court's orders by either the State of Virginia or the County of Prince Edward."

The District Court further pointed out:

> "That the material difference"

between the Amended Supplemental Complaint and the complaint in intervention sought to be filed, was that the Attorney General sought to enjoin the expenditure of any State funds for the maintenance of any free public schools anywhere in the State "so long as free public schools of Prince Edward County remain closed." Of this the District Court said (R. 173):

> "Such relief, if granted, would be unnecessarily punitive, in that it would require the closing of most, if not all, of the free public schools in Virginia. Whether

> the means, if legal, justifies the end is questionable, to say the least."

The District Court thereafter overruled the several motions of the defendants to dismiss the Amended Supplemental Complaint but without prejudice to their right to renew those motions; answers were filed; and the matter came on for hearing on July 24, 1961.

On August 23, 1961, the District Court handed down its memorandum opinion—*Allen, et al* v. *County School Board*, 198 F. Supp. 497 (R. 52). The court held that it was necessary to have State interpretation of the Virginia Constitution and statutes adopted pursuant thereto in order for the court to determine the question, which it stated as follows:

> "Can the public schools, heretofore maintained in Prince Edward County, be closed in order to avoid the racial discrimination prohibited by the Fourteenth Amendment?"

The court held that the County ordinance "in aid of education" and the County tax credit ordinance "circumvented" or attempted to "circumvent" or "frustrate" the order of April 22, 1960, and enjoined payments or credits under the said ordinances.

It also held that the correct construction of Sections 22-115.29, et seq., of the Code of Virginia, providing for State scholarship grants, permitted the use of grants only for children resident of a locality in which public schools were being operated, and that since no public schools were being operated in Prince Edward County payment of any

State scholarship grants to residents of that County would be enjoined so long as public schools were not there operated.

Thereafter some of the plaintiffs, represented by the same counsel who represented the plaintiffs in the District Court, filed in the Supreme Court of Appeals of Virginia an original petition for mandamus under the style *Griffin, et al* v. *Board of Supervisors of Prince Edward County*, in which they alleged that the Board of Supervisors had failed and refused to levy taxes and appropriate money for the operation of public schools; that under the Constitution and laws of the Commonwealth of Virginia they were required to do so; that the failure to levy the tax and appropriate the funds was in reaction to the opinion of the United States Court of Appeals in this case handed down May 5, 1959, and because they were unwilling to appropriate money for the operation of public schools where the races were taught together. They prayed a mandamus directed to the Board of Supervisors compelling them to levy the necessary tax and appropriate the funds.

The Board of Supervisors answered, denying that the Constitution and laws of the Commonwealth of Virginia required them to make any such appropriation and denying that its refusal to appropriate money violated the Fourteenth Amendment or the order of this Court entered April 22, 1960.

All counsel met with the District Judge to discuss with him the terms of the order to be entered on his opinion of August 23, 1961, after this mandamus suit had been instituted, and after the answer of the Board of Supervisors

had been filed, and after the petitioner had filed its brief in the Supreme Court of Appeals of Virginia. These papers were laid before the District Judge, and in his order of November 16, 1961 (R. 66), he recited:

> "It appearing from statement of counsel and the copy of the suit papers that an appropriate suit has been timely instituted in the Supreme Court of Appeals of Virginia, seeking a determination of the legal question posed in this Court's opinion of August 23, 1961, namely: 'Can the public schools, heretofore maintained in Prince Edward County, be closed in order to avoid the racial discrimination prohibited by the Fourteenth Amendment?' "

And the court reserved further consideration until determination by the Supreme Court of Appeals of Virginia "of pertinent provisions of the United States Constitution, the Virginia Constitution and statutes adopted pursuant thereto."

It thus having been represented to the District Court that the mandamus proceeding had been filed to settle the question propounded by the District Court, the Board of Supervisors filed its briefs in that proceeding upon all issues of state and federal law.

Whereupon, having participated in the above mentioned representation to the District Court on the basis of which the recitation above-quoted was made in the order of November 16, 1961, the plaintiffs in the mandamus proceeding filed their reply brief, Section VI of which had the following heading:

"The Pleadings in This Case Present No Federal Question."

The first sentence under the heading was:

"There are no federal questions in this proceeding."

The Supreme Court of Appeals of Virginia rendered its opinion in March, 1962, in *Griffin* v. *Board of Supervisors of Prince Edward County*, 203 Va. 321, (1962), in which it stated that the plaintiffs disclaimed the raising of any federal question and that in the light of that disclaimer the Supreme Court of Appeals stated that it perceived none. The Supreme Court held that under Section 136 of the Constitution of Virginia it lie within the discretion of the Board of Supervisors whether it would levy any tax or make any appropriation for the operation of public schools and that there is no judicial process by which the court could compel the levy of a tax and the appropriation of money.

Thereafter the plaintiffs filed a motion in District Court of a type unknown to any form of recognized procedure which they entitled "a motion for further relief" in which they sought to raise new matter and new questions; the defendants filed a motion to dismiss the proceeding or in the alternative to abstain from determining the issues presented in the Supplemental Complaint and to dismiss the plaintiffs' motion for further relief. This motion to dismiss was predicated upon the representation of the plaintiffs' attorney to the District Court concerning the scope of the mandamus proceeding and their statements to the State Court belieing their representations. (*Civic Employees As-*

sociation v. *Windsor*, 353 U.S. 364, 77 S.Ct. 838, 1 L. ed. 2d 894).

In addition thereto the defendants filed other motions including a motion filed by the School Board that the Amended Supplemental Complaint be dismissed as to it upon the finding of the court in its memorandum opinion of August 23, 1961, that:

> "There is no evidence the School Board of Prince Edward County has leased or transferred or intends to lease or transfer any school property. The prayer for injunctive relief is therefore denied."

And also the finding in the order of November 16, 1961, in which the court held:

> "There being no evidence that the School Board of Prince Edward County has leased or transferred or intends to lease or transfer any school property, the plaintiffs' prayer for injunctive relief is denied."

The court having indicated that it would not dismiss the Amended Supplemental Complaint as to the School Board, the School Board moved under Rule 56 of the Rules of Civil Procedure for summary judgment in its favor on Paragraph 16 of the Amended Supplemental Complaint and dismissal thereof. The court granted that motion and by order of May 24, 1962 (R. 69), it found that there was no just reason for delay in disposing of that claim and it directed that final judgment in favor of the School Board on that cause of action be entered.

On July 25, 1962, the District Court handed down a

memorandum opinion—*Allen, et al* v. *County School Board, etc.*, 207 F. Supp. 349 (1962). It referred to the motion of the defendants that the court further abstain

> "upon the ground the petitioners deliberately failed and refused to comply with the order of this Court by deleting all federal questions from the suit filed in the Supreme Court of Appeals."

It overruled the motion saying that it "would be meritorious had the defendants filed an appropriate answer and/or countersuit to the plaintiffs' petition for writ of mandamus."

It held:

> "That the public schools of Prince Edward County may not be closed to avoid the effect of the law of the land as interpreted by the Supreme Court, while the Commonwealth of Virginia permits other public schools to remain open at the expense of the taxpayers."

It having become certain that the plaintiffs would not institute proceedings in the state court required to obtain a decision of questions of state law involved in this case, either by the speedy remedy available to them of mandamus before the Supreme Court of Appeals or otherwise, the School Board filed a petition for declaratory judgment in the Circuit Court of the City of Richmond against some of the plaintiffs, the State Board of Education and the Superintendent of Public Instruction raising for decision the pertinent state questions.

On September 7, 1962, a hearing was had before the

District Judge. The pleadings in the case then pending in the state court were laid before the court and the defendants orally moved for further abstention. The plaintiffs presented an order which they asked the court to enter. At the same time they expressly disclaimed that they were asking for an injunction against the use of any of the moneys in the operation of public schools elsewhere in the State so long as schools may be closed in Prince Edward (Tr. 9/7/62, p. 90). The court took all matters under advisement.

Another hearing was held on October 3, 1962, at which time the defendants filed a motion entitled "Motion of Defendants to Amend the Findings Contained in the Memorandum Opinion of July 25, 1962, to Rehear and Reconsider in Part That Opinion, and to Abstain." In that motion all defendants requested the court to correct that opinion so as to state that the Board of Supervisors did file a proper answer in the mandamus case before the Supreme Court of Appeals and to reiterate the finding which the court had made in its decree of November 16, 1961, to which no party had taken objection. Next all defendants moved the court to reconsider and rehear their motion to dismiss or in the alternative to abstain from determining the issues presented in the Amended Supplemental Complaint upon the ground that the plaintiffs deliberately failed to comply with the court's order of November 16, 1961. Finally, all of the defendants moved that the court abstain from determining the issues presented until the courts of the Commonwealth of Virginia should have first passed upon the issues presented by the above-mentioned petition for declaratory judgment filed August 31, 1962, in the Circuit Court of the City of Richmond. Copies of the pleadings in that suit were filed with the motion.

On October 10, 1962, the Court handed down and entered a memorandum opinion and order (R. 82). (It is noted that the word "order" is omitted in the printing). The court overruled the motion filed on October 3, 1962. It did, however, correct one or two of the more egregious errors found in the opinion of July 25, 1962.

On the same day—October 10, 1962, the court entered another order by which it made certain formal findings of fact, and concluded that the closing of the public schools in Prince Edward County, under the circumstances and conditions there existing, is prohibited by the Fourteenth Amendment, and it adjudged, ordered and decreed:

> "that the public schools of Prince Edward County may not be closed to avoid the effect of the law of the land as interpreted by the Supreme Court while the Commonwealth permits other public schools to remain open at the expense of the taxpayers."

The court deferred entry of any further order pending review in the Circuit Court and by the Supreme Court of its orders of October 10, 1962.

Assignments of error were made by all parties, plaintiff and defendant, and the case was duly appealed to the Court of Appeals, was argued on January 9, 1963 and by opinion rendered August 12, 1963 the court of Appeals held that:

> "These controlling questions of state law, uncertain and unsettled as they are, ought to be determined by the Supreme Court of Appeals of Virginia * * *."

It thereupon vacated the judgments of the District Court

and remanded the case with instructions to abstain until the Supreme Court of Appeals of Virginia "shall have decided the case now pending on its docket entitled *County School Board of Prince Edward County, Virginia, et al* v. *Leslie Francis Griffin, Sr., et al.*

The decision of the above-mentioned case in the Supreme Court of Appeals of Virginia—*County School Board of Prince Edward County, Virginia, et al.* v. *Leslie Francis Griffin, Sr., et al,* was rendered December 2, 1963. .....Va. ..... 133 S.E. 2d 565. This court granted certiorari on January 6, 1964 and granted a stay of the mandate of the Court of Appeals.

II.

QUESTIONS RAISED

Neither the brief of the petitioners nor the Amicus Curiae brief of the United States purports to deal with several important preliminary questions which have yet to be decided in this case, and as to which we believe we have a right to a decision. These preliminary questions are:

1. Does the Amended Supplemental Complaint state a new cause of action?

2. Is this a suit against the state prohibited by the Eleventh Amendment of the Constitution of the United States?

3. May the injunctions prayed for be granted except after a hearing before a three-judge statutory court?

These questions will be referred to herein, but are discussed in detail in the briefs of other defendants.

The following main questions are the principal subject of this brief:

4. Does the action of the Board of Supervisors of Prince Edward County in failing to levy taxes and appropriate local revenue for the operation of public schools, taken in light of the provisions of the Virginia State Scholarship Grant Law along with the local ordinances, violate rights of the petitioners under the Constitution of the United States?

5. May State or local scholarship grants be enjoined?

6. Does the judicial power extend to compel a legislative body to make a law, that is, to levy taxes and to appropriate local revenue?

III.

FACTS

Many of the broad general facts essential to an understanding of this case are set forth in the statement of the history of the case. In addition thereto, we accept the findings made by the District Judge in his opinion of August 23, 1961, beginning with the fourth paragraph from the bottom of page 58 of the record and running through the fifth paragraph on page 60 of the record. The one exception is the last paragraph on page 58 wherein it is stated that the private schools operated by the Prince Edward School Foundation during the year 1959-60 were "for white children only." It would have been accurate to say that those schools were attended by white children only.

In addition to these facts it is necessary to set forth the

additional facts which have intervened since this case was decided in the District Court and since the decision in the Court of Appeals.

The Supreme Court of Appeals of Virginia has defined the duties and responsibilities and the limits thereof imposed upon and granted to the General Assembly of Virginia, the State Board of Education, the Superintendent of Public Instruction, the County School Board and Superintendent of Schools and the Board of Supervisors.

It is first to be noted that the Constitution of Virginia vests all legislative power in the General Assembly of Virginia except to the extent that such legislative power is limited by the provisions of the Constitution of Virginia. Section 63 Constitution of Virginia.

The powers and duties and limitations thereon of each of the foregoing agencies of the State of Virginia are fixed by Article IX of the Constitution. These provisions of the Constitution are not only grants of authority, but they are limitations upon the powers of the General Assembly and of each of the other agencies of state and local government.

In *Griffin* v. *Board of Supervisors of Prince Edward County*, 203 Va. 321, 124 S.E. 2d 227, and in *County School Board of Prince Edward County* v. *Leslie Francis Griffin, Sr., et al*, Va., 133 S.E. 2d 565, the Supreme Court of Appeals of Virginia has declared the final construction of these provisions of the Virginia Constitution.

As thus construed Section 141 of the Constitution of Virginia, put into effect by Section 22-115.29 through 22-115.37, provides for the payment of a sum ($225.00 elementary, $250.00 secondary) to the parents of chil-

dren between the ages of six and twenty years residing within the Commonwealth of Virginia for the education of children of the Commonwealth in "a non-sectarian private school located in or outside, or a public school located outside the locality in which such child resides." The parent and the child have complete freedom in the selection of the school and there is no element of race involved whatsoever. These funds are available to parents whether or not public schools are operated in the county of their residence.

The school boards are established by Section 133 and are given "the supervision of schools in each county and city." The local school board under Section 136 is given the power to expend funds appropriated to them "in establishing and maintaining such schools as in their judgment the public welfare may require."

The Board of Supervisors of the counties of Virginia in like manner are not creatures created by the General Assembly, but are established under the Constitution of Virginia. They are created by Article VII of the Constitution, under the title "Organization and Government of Counties", Section 111 of the Constitution of Virginia. By this section they are given the power to "lay county and district levies."

In *Griffin* v. *Board of Supervisors of Prince Edward County*, supra, the Supreme Court of Appeals held:

> "We find in neither Section 136 of the Constitution nor in the statutes implementing it, any support for the petitioners' contention that the Board of Supervisors is under the mandatory duty to levy local taxes and appropriate moneys for the support of public free schools in the county."

And in *County School Board of Prince Edward County* v. *Leslie Francis Griffin*, supra, the Supreme Court of Appeals reiterated its prior holding with this statement:

> "The Board of Supervisors, the governing body of Prince Edward County, has since the year 1958-59 refused to make appropriation of these necessary funds. It cannot be compelled to do so by the General Assembly, by this court, or by any authority except its own people."

With respect to the General Assembly in *County School Board of Prince Edward County* v. *Leslie Francis Griffin, Sr.*, supra, the court declared that the General Assembly had performed the duty imposed upon it by Section 129 of the Constitution of Virginia when it adopted the school code fixing a plan for the establishment and maintenance of a school system. It further held:

> "The only funds for the operation of public schools required to be furnished by the General Assembly are the three funds constituting the 'constitutional minimum' referred to above. (Section 135 Constitution of Virginia). As indicated above, Prince Edward county's share of these funds is wholly insufficient for operating the public schools in that county." * * *
>
> * * *
>
> "Section 135 authorizes the General Assembly to make such other appropriations for school purposes 'as it may deem best.' It has deemed it best to make such other appropriations on a conditional or matching basis, requiring the appropriation of funds by the lo-

calities, to be raised and expended as provided by §136 by local school authorities 'in establishing and maintaining such schools as in their judgment the public welfare may require.' "

As said by the trial judge in his very thorough opinion:

"Beginning with the Appropriation Act of 1916 (Acts of Assembly, 1961, Ch. 520), wherein the sum of $200,000 appropriated to the State Board of Education, to be apportioned to the counties for use by the local school authorities in the establishment of one and two room rural schools, was conditioned upon the local levies for county school purposes for the year aggregating a sum equal to or greater than the average rate of the levies of county school funds of the Commonwealth, and continuously since that time each successive Appropriation Act has required that county schools be in operation and that certain funds be levied, appropriated, or expended by the local governing body before any of the 'State' money becomes available. This makes the local governing body and through it, the people of the locality, the key to the public educational system of this Commonwealth."

"That this has consistently been the pattern of appropriation through the years may be seen by reference to Acts 1918, pp. 693-4, 727; Acts 1928, pp. 394, 458; Acts 1938, pp. 819-20, 890; Acts 1960, p. 995; Acts 1962, pp. 1334-6."

The court further held with respect to the state grants to parents in aid of the education of children:

> "We perceive nothing in or outside of the statutes to render these scholarships unavailable to any eligible child in Prince Edward County whether public free schools are operated in that county or not."

In sum, the State Constitution and law permits each locality in Virginia to provide for the education of its children by any of the following methods:

(1) By an appropriation of the local governing body to the local school board for the operation of public schools, in which event funds conditionally appropriated by the General Assembly are also available to the local school board for that purpose.

(2) By an appropriation of state and/or local funds to be paid to parents for the education of children in public or non-sectarian private schools of the parents' choice. (A minimum of $250 secondary and $225 elementary is provided).

(3) A combination of each of the foregoing methods, the state scholarship being in any event available to parents choosing to use them.

The remaining, and it is submitted, extremely important facts which have occurred since the opinion rendered in the Court of Appeals are the following facts which are well known to the Department of Justice and to counsel for the petitioners:

Through the cooperation of the Justice Department of the United States, the Governor of Virginia, Attorneys for the School Board of Prince Edward County and for

the Board of Supervisors of Prince Edward County with the approval of each of the said boards and with the cooperation of Negro leaders and officers of the NAACP in Prince Edward County, substantially all of the Negro children of the County have been in school since September, 1963, and will continue in school at least until September of 1964.

This school is operated by a non-profit corporate association chartered under the laws of the Commonwealth of Virginia under the management and direction of a Board of Trustees composed of Virginia Educators, three of whom are white: Honorable Colgate W. Darden, former Governor of Virginia and retired President of the University of Virginia, Dr. Fred B. Cole, President of Washington and Lee University, Dr. F. D. G. Ribble, Professor of law and former Dean of the University of Virginia Law School; three of whom are Negro: Dr. Earl H. McClenny, President of St. Paul's College, Lawrenceville, Virginia, Dr. Robert P. Daniel, President of Virginia State College, Petersburg, Virginia, and Dr. Thomas Henderson, President of Virginia Union University, Richmond, Virginia.

The faculty of this school is composed of both Negro and white teachers.

The student body of this school is composed of both white and Negro students.

The school is conducted in the two best and most modern school buildings owned by the School Board of Prince Edward County.

All school buses, laboratory equipment, and other teach-

ing aids owned by the School Board of Prince Edward County have been made available for the use of this school.

The School Board of Prince Edward County receives for the use of this property, valued at $2,250,000.00 only such sum as is estimated to be sufficient to cover the cost of insurance, maintenance, repairs and janitorial and custodial care of the property.

This school is presently financed by private contributions.

Education can be provided for children resident of Prince Edward County desiring to attend the said school for a regular nine months school term by the use of funds available through scholarship aid to parents under State and/or local law, provided; the school adopts a policy to charge tuition equal to the cost of operating the same, and provided, the parents of said children will apply for said funds and will pay said funds to the school for the education of the children in attendance.

IV.

ARGUMENT

1.

THE AMENDED SUPPLEMENTAL COMPLAINT PRESENTS A NEW AND DIFFERENT CAUSE OF ACTION FROM THAT PRESENTED IN THE ORIGINAL COMPLAINT AND SHOULD HAVE BEEN DISMISSED

The law and argument on this question will be discussed

in the brief filed on behalf of the School Board. We adopt what is said therein.

2.

THIS IS A SUIT AGAINST THE STATE PROHIBITED BY THE ELEVENTH AMENDMENT

The Board of Supervisors adopts the argument in the brief of the Attorney General of Virginia on this question.

3.

THE INJUNCTIONS PRAYED FOR IN THE AMENDED SUPPLEMENTAL COMPLAINT, THE INJUNCTIONS AWARDED BY THE DISTRICT COURT AND THE INJUNCTIVE RELIEF REQUESTED IN THE BRIEF OF THE PETITIONERS AND IN THE BRIEF OF THE DEPARTMENT OF JUSTICE MAY NOT BE GRANTED BY ANY COURT EXCEPT A THREE-JUDGE STATUTORY COURT

The law and argument on this question is to be presented in the brief of the Attorney General of Virginia, and the Board of Supervisors of Prince Edward County adopts that brief on this question.

4.

THE FAILURE OF THE BOARD OF SUPERVISORS OF PRINCE EDWARD COUNTY TO LEVY TAXES AND APPROPRIATE

FUNDS TO THE SCHOOL BOARD OF PRINCE EDWARD COUNTY FOR THE OPERATION OF PUBLIC SCHOOLS TOGETHER WITH THE STATE SCHOLARSHIP LAW AND THE LOCAL ORDINANCE APPROPRIATING FUNDS TO PARENTS IN FURTHERANCE OF THE EDUCATION OF CHILDREN DOES NOT VIOLATE RIGHTS OF THE PETITIONERS UNDER THE CONSTITUTION OF THE UNITED STATES

a. *What Are The Petitioners' Constitutional Rights Under Brown v. Board of Education?*

In each of the cases decided in *Brown v. Board of Education* admission to public schools had been denied under laws "requiring or permitting segregation according to race" in publicly owned and operated schools. The court said:

> "We now announce that such segregation is a denial of equal protection of the laws."

This decision removed all state restraint, based upon race, in admission and education in public schools. It was simply an enlargement of the liberty of both the white and the Negro race not to be denied access and use of public educational facilities on account of race.

This is made clear in the companion case of *Bolling v. Sharpe*, 347 U.S. 497, 98 L. ed 884. It conferred no affirmative right. It simply removed restraint upon liberty

based upon race and conferred equal rights upon all citizens regardless of race to have access to and to use public educational facilities.

The decision conferred no affirmative right upon members of any race to attend schools with members of another race, nor did it require that any state provide education for its children, nor did it prescribe or limit the reserved powers of the states to control the method by which the state would provide for the education of its citizens. It did nothing more than remove restraints, based upon race, upon the liberty of all our people.

This was the concept upon which Mr. Justice Harlan dissented in *Plessy* v. *Ferguson*, 163 U.S. 537, 41 L.ed. 256, where he said (163 U.S. 557):

> "The fundamental objection, therefore, to the statute, is that it interferes with the personal freedom of citizens. 'Personal liberty,' it has been well said, 'consists in the power of locomotion, of changing situation, or removing one's person to whatsoever places one's own inclination may direct, without imprisonment or restraint, unless by due course of law.' 1 Bl. Com. 134. If a white man and a black man choose to occupy the same public conveyance on a public highway, it is their right to do so, and no government, proceeding alone on grounds of race, can prevent it without infringing the personal liberty of each."

Again, in his dissent in *Berea College* v. *Kentucky*, 211 U.S. 45, 29 S.Ct. 33, 53 L.ed 81, at 211 U.S. 67 and 68 he says:

> "* * * This court has more than once said that the liberty guaranteed by the 14th Amendment embraces 'the right of the citizen to be free in the enjoyment of all his faculties,' and 'to be free to use them in all lawful ways.' Allgeyer v. Louisiana, 165 U.S. 578, 41 L.ed. 832, 17 Sup. Ct. Rep. 427; Adair v. United States, 208 U.S. 161, 173, 52 L.ed. 436, 442, 28 Sup. Ct. Rep. 277. If pupils, of whatever race,—certainly, if they be citizens,—choose, with the consent of their parents, or voluntarily, to sit together in a private institution of learning while receiving instruction which is not in its nature harmful or dangerous to the public, no government, whether Federal or state, can legally forbid their coming together, or being together temporarily, for such an innocent purpose." * * *

The most classic and frequently quoted statement of what this court decided in *Brown* v. *Board of Education* is attributed to the late Chief Judge Parker of the Court of Appeals for the Fourth Circuit in *Briggs* v. *Elliott*, 132 F. Supp. 776 (1955):

> "Having said this, it is important that we point out exactly what the Supreme Court has decided and what it has not decided in this case. It has not decided that the federal courts are to take over or regulate the public schools of the state. It has not decided that the states must mix persons of different races in the schools or must deprive them of the right of choosing schools or must require them to attend schools or must deprive them of the rights of choosing the schools they attend. What it has decided, and *all that it has decided*, is that a state may not deny to any person on account of race the right to attend any school

> *that it maintains*. This, under the decision of the Supreme Court, the state may not do directly or indirectly; but *if the schools which it maintains* are open to children of all races, no violation of the Constitution is involved even though the children of different races voluntarily attend different schools, as they attend different churches. Nothing in the Constitution or in the decision of the Supreme Court takes away from the people freedom to choose the schools they attend. *The Constitution, in other words, does not require integration.* It merely forbids discrimination. It does not forbid such segregation as occurs as the result of voluntary action. It merely forbids the use of governmental power to enforce segregation. The Fourteenth Amendment is a limitation upon the exercise of power by the state or state agencies, not a limitation upon the freedom of individuals." (Emphasis supplied)

Similar language was used by the Court of Appeals for the Eighth Circuit in *Byrd* v. *Sexton*, 277 F. 2d 418, 425 (1960), *cert. denied*, 364 U.S. 819, 5 L.ed. 2d 49, 81 S. Ct. 53. There, after quoting from Brown, the court said:

> "Neither that language nor the holding itself prescribes as a federal right the availability of education, let alone free education, through state facilities. The opinion stands for the proposition that only 'where the state has undertaken to provide it', the opportunity of an education 'is a right which must be made available to all on equal terms'."

The Court of Appeals for the Fifth Circuit decided the same thing in *Avery* v. *Wichita Falls Independent School District*, 241 F. 2d 230 (1957), when it said at page 233:

> "The Constitution as construed in the School Segregation Cases * * * forbids any state action requiring segregation of children in public schools on account of race; it does not, however, require actual integration of the races."

The Court of Appeals for the Fifth Circuit had before it the Dallas "Three-School" Case—*Boson* v. *Rippy*, 285 F. 2d 43 (1960). It said at pages 45-46:

> "Negro children have no constitutional right to the attendance of white children with them in public schools."

Certainly there is no more integrationist minded body in the whole United States than is the United States Commission on Civil Rights, one member of which was attorney for the Negro children in the school segregation cases. In Vol. 2 of the 1961 Commission on Civil Rights Report entitled *Education*, and at the bottom of page 17, the Commission discusses the fact that in Baltimore most pupils choose to attend the school in the neighborhood of their homes and therefore to a large extent the enrollment of the schools reflects residential patterns. This, of course, results in considerable separation of the races. The Commission points out that this is a case of separation resulting from free private choice and that the only legal vice in such operation is that which is required or compelled by law. It said:

> "Since there is no legal *compulsion* in their choice of schools, no constitutional question as to the desegregation plan seems to arise." (Emphasis supplied)

Expressions to the same effect may be found in the opinions of other federal courts. See *Dove* v. *Parham*, 181 F. Supp. 504, 513 (1960); *Kelley* v. *Board of Education of City of Nashville*, 270 F. 2d 209, 228, 229 (1959); *Thompson* v. *County School Board of Arlington*, 144 F. Supp. 239 (1956); *School Board of the City of Newport News* v. *Atkins*, 246 F. 2d 325 (1957); *Covington* v. *Edwards*, 165 F. Supp. 957 (1958), affirmed 264 F. 2d 780 (1959); *McKissick* v. *Durham City Board of Education*, 176 F. Supp. 3 (1959); *Wheeler* v. *Durham City Board of Education* and *Spaulding* v. *Durham City Board of Education*, 196 F. Supp. 71 (1961).

b. *Education And The Method By Which It Is Provided Is Exclusively A Matter Of State Determination*

It has never been controverted that the education of its children is exclusively a subject of state determination reserved to them under the Tenth Amendment of the Constitution of the United States.

In 78 C. J. S., Schools and School Districts, Section 12, page 624, is found the following statement:

> "The power to establish and maintain systems of common schools, to raise money for that purpose by taxation, and to govern, control, and regulate such schools when established is one of the powers not delegated to the United States by the federal Constitution, or prohibited by it to the states, but is reserved to the states respectively or to the people, and the people through the legislature and the constitution have the right to control, and prescribe the limits to which they will go in supplying education at public expense. Education

> is a subject of governmental concern and activity and a proper subject of legislation; in view of its important position in American civilization, it has been the subject of a great deal of legislation and many changes have been made in the laws from time to time to meet new conditions."

State control of education of its citizens has long been recognized by this court. *Barbier* v. *Connolly*, 113 U.S. 27, 31, 5 S.Ct. 57; *Interstate Consol. Street R. Co.* v. *Mass.*, 207 U.S. 79, 87, 28 S.Ct. 26; *Cumming* v. *County Board of Education*, 175 U.S. 528, 545, 20 S.Ct. 197.

The principle was affirmed in *Brown* v. *Board of Education:*

> "Today, education is perhaps the most important function of state and local government."

And again—

> "Where the state has undertaken to provide it, it is a right which must be made available to all on equal terms."

Likewise, in *Cooper* v. *Aaron*, 358 U.S. 1, 78 S.Ct. 1401, 3 L.ed 2d 5:

> "It is, of course, quite true that the responsibility for public education is primarily the concern of the States, . . ."

This power of the State over the education of its citizens

is a continuing power and the State may change and alter its policy and methods with respect to providing education for its citizens as the public need may require from time to time.

It is stated thus in 78 C. J. S., Schools and School Districts, Section 13, page 628:

> "The legislature's power is not exhausted by exercise, but a system may be changed, or one system substituted for another, as often as the legislature deems it necessary or expedient so to do. The system should be so maintained as to keep abreast with progress generally and to meet the needs of the times."

This power of the State to alter and to change the method by which it provides education is not impaired by any provision of the Constitution of the United States. It is, of course, true that whatever system the State provides may not violate the Fourteenth Amendment, however, the mere fact that the State chooses to change its system is not a subject controlled by the Constitution of the United States so long as the change conforms to the due process and equal protection clause of the Fourteenth Amendment.

In *Sperry & Hutchinson Co.* v. *Ada T. Rhodes*, 220 U.S. 502, 31 S.Ct. 490, 55 L. ed 561, Mr. Justice Holmes said:

> "* * * the 14th Amendment does not forbid statutes and statutory changes to have a beginning and thus to discriminate between the rights of an earlier and later time."

Therefore, we conclude that the State has the whole power to determine by what means it shall provide for the education of its people, that there is no duty imposed upon the State under the Federal Constitution to make any provision for the education of its people, and that there is no limitation upon the power of the State to change, modify, enlarge or diminish the provisions which it makes with respect to the education which it will provide for its citizens. It is, of course, recognized that any provision made by the State for the education of its people must not violate the 14th Amendment of the Constitution of the United States.

c. *The Motive Of A Legislative Body Will Not Make Unconstitutional Legislation Which Is Otherwise Constitutional*

The petitioners and the Department of Justice to a lesser extent seem to rest their rights to relief in this case upon an alleged improper or unconstitutional motive on the part of the Board of Supervisors of Prince Edward County in refusing to levy taxes for public schools, and to a lesser extent upon the General Assembly and the Constitutional Convention of Virginia, which amended Section 141 of the Constitution in 1956. In some manner not delineated or specifically pointed out or supported by legal authority they appeal to the court to overthrow otherwise constitutional legislative action for the reason that such action is contaminated with a purpose to avoid teaching white and colored children together in public schools. They summarize this argument on page 32 of the petitioners' brief with the statement:

> "Public education in Prince Edward County was discontinued to abrogate, frustrate, avoid, and circumvent

> implementation of petitioners' right to equal educational opportunities."

They then assert that the Commonwealth of Virginia is providing, supporting and maintaining public schools in all localities of Virginia except Prince Edward County, thereby discriminating geographically against all students in the county.

The question of geographical inequality will be dealt with in due course.

Our contention here is that the motive or purpose of the legislative body, either local or state, is not a matter which the court will inquire into and is irrelevant upon the question of the constitutionality of the legislative action or inaction taken.

We do not contend that the purpose of an administrative agency is foreign or immaterial when one inquires into the question whether the administration of a law is unconstitutional. It is well and accurately said in *Snowden* v. *Hughes*, 321 U.S. 1 (1944), ...S.Ct....., ...L.ed. .....:

> "The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination."

Likewise, where a statute is obscure or ambiguous, the court in construing that statute may consider the legislative intent. *Merritt* v. *Welsh*, 104 U.S. 694.

What we do contend is this: That the right and power of a legislative body to adopt or to take legislative action is neither enlarged nor diminished by the motive and purpose of the body in adopting the legislation. The constitutionality of the legislation is to be determined by what the legislation provides and not by any motive or purpose which may have been in the minds of the legislative representatives.

For more than 100 years, indeed from 1810 to 1918, it was the settled law of this country that an act otherwise constitutional could not be rendered unconstitutional because of the motive or the purpose of the legislature in adopting the act. Then for a number of years the Supreme Court of the United States vacillated back and forth upon that point until finally in 1942 in one of the great decisions on "New Deal" legislation, the court apparently put to rest the contention that legislation otherwise constitutional could be rendered unconstitutional by the purpose or motive of the legislature in adopting it. The Supreme Court of the United States has not varied from that view. But strange to say, some of the lower federal courts, only in racial cases, has unearthed what we believe to be a legal heresy and has asserted that an improper motive or purpose may render legislation unconstitutional. See *NAACP* v. *Patty*, 159 F. Supp. 503 (1958), majority opinion by Judge Soper and dissent by Judge Hutcheson; reversed on other grounds in the Supreme Court of the United States—*Harrison* v. *NAACP*, 360 U.S. 167 (1959); *Bush* v. *Orleans Parish School Board*, 188 F. Supp. 916, where the court said:

> "No one dare contest the sole purpose of all this legislation is to defeat the constitutional right of colored children to attend desegregated schools. Since such is their purpose, they are all unconstitutional."

Actually, in the foregoing case the schools involved were clearly public schools and the laws which were attacked were clearly statutes, the effect of which would deny equal liberty of white and Negro children to attend public schools and it was entirely unnecessary for the court to rest its decision upon any issue of legislative purpose or motive.

As briefly as possibly we will give the course of decision on this issue in the Supreme Court of the United States.

Like most things in constitutional law we begin with Chief Justice Marshall. He first dealt with this question in the famous case arising out of the Yazoo Land frauds, *Fletcher* v. *Peck*, 6 Cranch 87 (1810). He said:

> "It may well be doubted how far the validity of a law depends upon the motives of its framers, and how far the particular inducements, operating on members of the supreme sovereign power of a state, to the formation of a contract by that power, are examinable in a court of justice."

Next in *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819). It was seized upon in 1936 as authority for the proposition that an improper purpose dominating a legislature would result in the unconstitutionality of its enactments. Marshall's famous language was:

> "Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government, it would become the painful duty of this tribunal, should a case requiring

> such a decision come before it, to say that such an act was not the law of the land."

Perhaps the leading living student of our Constitution is Edward S. Corwin of Princeton University. In a rather amazing book published in 1936, entitled *The Commerce Power versus States Rights*, he points out at page 216, et seq., that by this language Marshall never meant to give support to the claim that the purpose of a constitutional body could affect the constitutionality of its actions. He points out, as does Beveridge in his John Marshall, Vol. 4, page 298, that in writing his decision in the *Bank* case Marshall relied heavily upon Hamilton's opinion of February 23, 1791, on the constitutionality of the Bank of the United States, and Mr. Corwin demonstrated that Marshall uses the word "objects" in the same sense in which Hamilton uses it, i.e., as meaning "subjects" or "powers" and that he does not mean "purpose" or "motive."

If any man understood the Supreme Court of his day, it was Daniel Webster. He had been leading counsel for the Bank in the *McCulloch* case. He labored under no illusions concerning what Marshall had meant. In his argument in *Gibbons* v. *Ogden*, 9 Wheat. 1 (1824), Webster said:

> "Of course, there is no limit to the power to be derived from the purpose for which it is exercised. If exercised for one purpose, it may be also for another. No one may inquire into the motives which influenced sovereign authority. It is enough that such power manifests its will."

Here it is to be noted that the words "purpose" and

"motive" are used interchangeably as they are in many of the subsequent decisions of the Supreme Court of the United States. Mr. Corwin at page 213 of his book above cited says that in this context the words are interchangeable.

We jump to 1869 and *Veazie Bank* v. *Fenno*, 8 Wall. 533 (1869). That case involved a tax on bank circulation so heavy as to make it virtually certain that the notes of state banks would be eliminated from circulation. Reverdy Johnson and Caleb Cushing contended that the act was unconstitutional on the following ground:

> "Its excessive character, which is made evident by reference to the tax imposed on the circulation of the national banks already cited, proves that the true purpose of this tax is to destroy the state banks."

They were answered by the Court speaking through the then Chief Justice:

> "The first answer to this is that the Judicial cannot prescribe to the Legislative Departments of the Government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibility of the Legislature is not to the courts, but to the people by whom its members are elected."

The real struggle began with the lottery case of *Champion* v. *Ames*, 188 U.S. 321 (1903). It was argued that:

> "The test of the validity of a statute is its real, and not its apparent, object."

using the word "object" as being synonymous with "purpose." This contention the majority swept aside, but it weighed heavily with the minority who said:

> "That the purpose of Congress in this enactment was the suppression of lotteries cannot reasonably be denied. That purpose is avowed in the title of the act, and is its natural and reasonable effect, and by that its validity must be tested."

Two years later those who would write into our law the right of a court to determine the constitutionality of legislation by the supposed motives or purposes of the legislature returned to the attack in *McCray* v. *United States*, 195 U.S. 27 (1904). They were again rebuffed.

That case involved the constitutionality of an act placing a prohibitive tax on oleomargarine colored to resemble butter. The Court said:

> "It is, however, argued that if a lawful power may be exerted for an unlawful purpose, and thus, by abusing the power, it may be made to accomplish a result not intended by the Constitution, all limitations of power must disappear, and the grave function lodged in the judiciary, to confine all the departments within the authority conferred by the Constitution, will be of no avail. This, when reduced to its last analysis, comes to this: that, because a particular department of the government may exert its lawful powers with the object or motive of reaching an end not justified, therefore it becomes the duty of the judiciary to restrain the exercise of a lawful power whenever it seems to the judicial mind that such lawful power has been abused. *But this*

reduces itself to the contention that, under our constitutional system, the abuse by one department of the government of its lawful powers is to be corrected by the abuse of its powers by another department."

* * *

"The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful *purpose* or *motive* has caused the power to be exerted." (Emphasis supplied)

Some of the similar cases prior to 1918 are *Hipolite Egg Co.* v. *United States*, 220 U.S. 45 (1911); *Hoke* v. *United States*, 227 U.S. 308 (1913); and *Weber* v. *Freed*, 239 U.S. 325 (1915).

The country was stunned in 1918 by *Hammer* v. *Dagenhart*, 247 U.S. 251, which involved an act prohibiting the shipment in interstate commerce of the products of child labor. The act was declared unconstitutional. Despite the disclaimer of the majority that:

"We have neither authority nor disposition to question the motives of Congress in enacting this legislation."

The minority in the famous dissent of Mr. Justice Holmes puts its finger upon what has since become regarded as the primary vice of that decision and said:

"In a very elaborate discussion the present Chief Justice excluded any inquiry into the the purpose of an act which, apart from that purpose, was within the power of Congress."

The court immediately returned to the sound views set forth in the earlier cases in its decision in *United States* v. *Doremus*, 249 U.S. 86 (1919); *Hamilton* v. *Kentucky Distilleries Co.*, 251 U.S. 146 (1919); and *Smith* v. *Kansas City Title & T. Co.*, 255 U.S. 180 (1921).

Then in *Bailey* v. *Drexel Furniture Co.*, 259 U.S. 20 (1922), the child labor tax case, and despite the brilliant argument of that great constitutional lawyer Solicitor General Beck which Mr. Corwin (*op. cit.* p. 234) sets forth at some length, the court declared the legislation unconstitutional because of the purpose and the motive of the Congress. In *Linder* v. *United States*, 268 U.S. 5 (1925), it did likewise.

Then in a great opinion by Mr. Justice Brandeis, i.e., *Arizona* v. *California*, 283 U.S. 423 (1931), it swung back to the views of Chief Justice Marshall and Chief Justice White. Three years later over the dissent of Justices Cardozo, Brandeis and Stone, in *United States* v. *Constantine*, 296 U.S. 287 (1935), the court held that the motive and purpose of a legislative body was determinative of constitutionality. Then in *United States* v. *Butler*, 297 U.S. 1 (1936), seizing upon the language heretofore quoted from *McCulloch* v. *Maryland*, *supra*, the court declared the Agricultural Adjustment Act of 1933 unconstitutional because of the congressional purpose. In speaking of the child labor tax case, i.e., the *Bailey* case, the court said:

> "But their purpose was found to be to regulate the conduct of manufacturing and trading, not in interstate commerce, but in the states. * * *."

Hard upon the *Butler* case followed *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936), which was to the same effect. Then the court in 1937 sought to slam the door upon this Pandora's Box which it had opened up, and in *Sonzinsky* v. *United States*, 300 U.S. 506 (1937), it held that motives of the legislative body had nothing to do with constitutionality, and in *United States* v. *Darby*, 213 U.S. 100 (1941), it is believed that the court finally extinguished the heresy which had begun with *Hammer* v. *Dagenhart*, *supra*, and it said in a great decision by Mr. Justice Stone:

> "The *motive* and *purpose* of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control." (Emphasis supplied)

And the court expressly overruled the doctrine of *Hammer* v. *Dagenhart*, *supra*.

This view has been followed by the Supreme Court since that time. For instance see *United States* v. *Kahriger*, 345 U.S. 22 (1953), and the very interesting case of *United States* v. *Calamaro*, 354 U.S. 351 (1957), where the government contended that "pickup" men in the "number game" were covered by the gambling tax statute:

> "because its enactment was 'in part motivated by a congressional desire to suppress wagering.'"

The Court said:

> "* * * we would not be justified in resorting to collateral motives or effects which, standing apart from

> the taxing power, might place the constitutionality of this statute in doubt."

The Supreme Court in 1958 had before it the case of *Shuttlesworth* v. *Birmingham Board of Education*, 358 U.S. 101 (1958). There in a *per curiam* opinion of one sentence the three-judge District Court's opinion had been affirmed. That District Court had said (*Shuttlesworth* v. *Birmingham Board of Education*, 162 F. Supp. 372 (1958)).

> "In testing constitutionality 'we cannot undertake a search for motive.' 'If the State has the power to do an act, its intention or the reason by which it is influenced in doing it cannot be inquired into.' Doyle v. Continental Ins. Co., 94 U.S. 535, 541, 24 L.ed 148. As there is no one corporate mind of the legislature, there is in reality no single motive. Motives vary from one individual member of the legislature to another. Each member is required to 'be bound by Oath or Affirmation to support this Constitution.' Constitution of the United States, Article VI, Clause 3. Courts must presume that the legislators respect and abide by their oaths of office and that their motives are in support of the Constitution."

Some have thought that language quoted in *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960), from *Western U. Tel. Co.* v. *Foster*, 247 U.S. 105 (1918), was to the contrary. We do not so understand because in the *Western Union* case the statement was made by the court in response to the thought that a state might exclude the Telegraph Company from the use of streets unless the Telegraph Company would

submit to state regulation of its interstate activities. Of course, the surrender of constitutional rights can never be made the condition of a right to do anything.

d. *Virginia's System Of Education Fosters "Liberty" Protected By The First, Fifth And Fourteenth Amendment*

We are bold to say not only that the system of secondary education in effect today in Virginia and in Prince Edward violates no federal constitutional prohibition; it actually fosters and nourishes the "liberty" protected by the First, Fifth and Fourteenth Amendment.

The Virginia system is one in which public schools, if a locality sees fit to operate them, receive aid from the locality and from the state, and at the same time parents who desire their children to attend public schools outside the locality, or private, non-sectarian schools wherever located, if they apply therefor, may receive state scholarship grants (Code, § 22-115.30), and local scholarship grants (Code § 22-115.32), or local grants in aid of education, if the governing body of the locality so provides (Code, § 22-115.36).

The nature of this system is the same whether public schools are operated in the locality or not. The state scholarships are available in any event and the local governing body may supplement them if it chooses to appropriate more than its share thereof under the Code sections above referred to.

This system (1) aids the parents in availing themselves of a great "liberty"—the right to have their children edu-

cated in the manner and under the conditions which they select; (2) it fosters another of our cardinal liberties—the right to choose associates and associations. To a discussion of these rights we now turn.

The family has always been the principal dependence in western civilization for the rearing, and molding of the mind and character, of the child. This fundamental concept has been declared to be among the liberties protected against federal interference by the Fifth Amendment and protected against state interference by the Fourteenth Amendment.

The question first came before this court in 1923 in *Meyer* v. *Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.ed 1042, and in *Bartels* v. *Iowa*, 262 U.S. 404, 43 S.Ct. 628, 67 L.ed 1047. The opinion of the court was written in *Meyer* v. *Nebraska*.

Meyer being a teacher in a German language school was arrested under a Nebraska statute making it unlawful to teach any child below the eighth grade in any language other than the English language. He was convicted. His conviction was affirmed by the Supreme Court of Nebraska, and thus the case came before the Supreme Court of the United States. In overthrowing the statute the court quoted the following general statement of those things which are included in the term "liberty" as used in the United States Constitution:

> "While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration, and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but

> also the right of the individual to contract, to engage in any of the common occupations of life, *to acquire useful knowledge, to marry, establish a home and bring up children*, to worship God according to the dictates of his own conscience, and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." * * * (Emphasis supplied)

In declaring the Nebraska statute to be an invasion of the right of the appellant to teach and of children to acquire knowledge the court said:

> "That the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally, and morally, is clear; but the individual has certain fundamental rights which must be respected. The protection of the Constitution extends to all—to those who speak other languages as well as those born with English on the tongue. Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution—a desirable end cannot be promoted by prohibited means." * * *

The two above cited cases were followed in 1925 by *Pierce* v. *Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.ed 1070. A statute of the State of Oregon required all children of that State to attend *public schools operated by the State*. An injunction was sought against State officers to restrain enforcement of the statute by two corporate organizations. The cases were consolidated and heard together. The court said:

> "Appellees asked protection against arbitrary, unreasonable, and unlawful interference with their patrons, and the consequent destruction of their business and property." * * *

Having thus permitted the corporate complainants to assert the liberties of their patrons in the protection of their business and property the court laid down the following as a protected liberty of parents:

> "Under the doctrine of Meyer v. Nebraska, (supra), we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

Then followed in 1927 the decision in *Farrington* v. *Tokushige*, 273 U.S. 289, 47 S.Ct. 406, 71 L.ed 646. The territory of Hawaii had enacted statutes requiring the payment of fees on the basis of the number of pupils attending schools taught in a foreign language and imposing other unreasonable and arbitrary restrictions upon such schools.

In declaring these statutes an invasion of protected liberties, the court said:

> "The general doctrine touching rights guaranteed by the 14th Amendment to owners, parents and children in respect of attendance upon schools has been announced in recent opinions. (Citing Meyer v. Nebraska, supra; Bartels v. Iowa, supra; Pierce v. Society of Sisters, supra.) While that Amendment declares that no state shall 'deprive any person of life, liberty or property without due process of law,' the inhibition of the 5th Amendment—'no person shall . . . be deprived of life, liberty or property without due process of law'—applies to the *federal government* and *agencies set up by Congress for the government of the territory.* Those fundamental rights of the individual which the cited cases declared were protected by the 14th Amendment from infringement by the states, are guaranteed by the 5th Amendment against action by the territorial legislature or officers. (Emphasis supplied)

Thus the whole circle is closed and the liberty of parents to choose the environment under which their children shall be educated and trained, and the teachers who shall provide education and training, is protected from interference by any governmental power, either state or federal. We here bring to the attention of the court that these decisions themselves limit the decision of this court in *Brown* v. *Board of Education* to the proposition that *Brown* v. *Board of Education* simply removed the power of the state to restrain the liberty of any person on account of race from access and use of public educational facilities. It could not require any

affirmative obligation of any citizen to be present or to attend a public educational facility because the principles declared in the three foregoing cases forbid the power of government, either federal or state, to be thus extended. Of course, these cases may be overruled and reversed, but it is not believed that the court had such a course in mind. A great deal will have to be retracted which has been said about liberty in other decisions if the court contemplates such a step.

For instance, in *United States* v. *Cruikshank*, 92 U.S. 542, 554, S.Ct. , 23 L.ed 589, the court made the following statement:

> "The Fourteenth Amendment prohibits a State from depriving any person of life, liberty or property, without due process of law; but this adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society." * * *

There is another cornerstone of American liberty and of our democratic society which is fostered, implemented and made effective by the Virginia educational system and its scholarship grants to parents. We refer to the First Amendment freedom of speech, assembly and association.

In *DeJonge* v. *Oregon*, 229 U.S. 353, 57 S.Ct. 255, 81 L.ed 278 (1937), this court had before it a statute punishing participation in a meeting for lawful discussion of public issues because held under the auspices of an organization which advocated the employment of unlawful means

to effect industrial or political changes. The court said (299 U.S. 364):

> "The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental." * * *

Hague v. *CIO*, 307 U.S. 496, 83 L.ed 1423, 59 S.Ct. 954 (1939), involved a municipal ordinance reposing arbitrary powers in a municipal officer requiring a permit for a public assembly upon the public streets, highways, parks or buildings. In striking down this statute as an infringement of free speech and assembly, Mr. Justice Stone, in a concurring opinion in which he was joined by Chief Justice Hughes, stated:

> "It has been explicitly and repeatedly affirmed by this Court, without a dissenting voice, that freedom of speech and of assembly for any lawful purpose *are rights of personal liberty* secured to all persons, without regard to citizenship, by the due process clause of the Fourteenth Amendment." (Citing nine (9) prior decisions of the court)

We next cite the case of *NAACP* v. *Alabama*, 357 U.S. 449, 2 L.ed 2d 1488, 78 S.Ct. 1163 (1958). An Alabama court had adjudged the NAACP in civil contempt for refusal to disclose the names and addresses of all its Alabama members and agents, etc. In a unanimous opinion by Mr. Justice Harlan the court said:

> "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is

> an inseparable aspect of 'liberty' assured by the due process clause of the 14th Amendment * * * Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious, or cultural matters, * * *"

Other cases suggestive of the same thought are *Shelton* v. *Tucker*, 364 U.S. 479, 5 L.ed 2d 231, 81 S.Ct. 247 (1960); *Bates* v. *Little Rock*, 361 U.S. 516, 4 L.ed 2d 480, 80 S.Ct. 412 (1960); *Konigsberg* v. *State Bar of California*, 366 U.S. 36, 6 L.ed 2d 105, 81 S.Ct. (1961). See also *Communist Party* v. *SAC Board*, 367 U.S. 1, 6 L.ed 2d 625, 81 S.Ct. 1357.

The most recent case is *Gibson* v. *Florida Investigation Committee*, 372 U.S. 539, 9 L.ed 2d 926, 83 S.Ct. 889. In an opinion by Mr. Justice Goldberg the court declared:

> "'This Court has repeatedly held that rights of association are within the ambit of the constitutional protections afforded by the First and Fourteenth Amendments." (Citations omitted)

In a concurring opinion, joined by Mr. Justice Black, Mr. Justice Douglas amplifies the protection extended to all lawful organizations (372 U.S. 562 & 563):

> "Joining a lawful organization, like attending a church, is an associational activity that comes within the purview of the First Amendment," * * *
>
> "* * * A Free Society is made up of almost innumerable institutions through which views and opinions are expressed, opinion is mobilized, and social, eco-

nomic, religious, educational, and political programs are formulated."

And further at 372 U.S. 569, et seq, he says:

"The right of association has become a part of the bundle of rights protected by the First Amendment (citing NAACP v. Alabama, supra), and a need for a pervasive right of privacy against government intrusion has been recognized, though not always given the recognition it deserves. Unpopular groups (NAACP v. Alabama, supra) like popular ones are protected. Unpopular groups if forced to disclose their membership lists may suffer reprisals or other forms of public hostility. * * * But whether a group is popular or unpopular, the right of privacy implicit in the First Amendment creates an area into which the Government may not enter.

" 'Freedom of religion and freedom of speech guaranteed by the First Amendment give more than the privilege to worship, to write, to speak as one chooses; they give freedom not to do nor to act as the government chooses. The First Amendment in its respect for the conscience of the individual honors the sanctity of thought and belief. To think as one chooses, to believe what one wishes are important aspects of the constitutional right to be let alone.' Public Utilities Com. v. Pollak, 343 U.S. 451, 467, 468, 96 L ed 1068, 1080, 72 S.Ct. 813 (dissenting opinion).

"There is no other course consistent with the Free Society envisioned by the First Amendment. For the views a citizen entertains, the beliefs he harbors, the utterances he makes, the ideology he embraces and the

people he associates with are no concern of government. That article of faith marks indeed the main difference between the Free Society which we espouse and the dictatorships both on the Left and on the Right."

Therefore, we respectfully submit that if motive is relevant, the motive here is a constitutional motive; that is a purpose to advance and enlarge protected liberty. If the parent has a right protected by the Fifth Amendment and by the Fourteenth Amendment to have a voice in the education and training of his child, then we say that Virginia is helping to make possible for the parent the exercise of that liberty. In doing so she does not violate the Constitution of the United States, she nourishes that liberty for which the Constitution itself was ordained.

e. *Virginia Does Not Violate The Fourteenth Amendment In Giving Each Locality An Option To Choose The Method By Which It Provides Education*

From what has been said heretofore, the following principles are established:

(1) The provision of education and the method by which it is provided lies wholly within the reserved powers of the State.

(2) The power is not exhausted by its exercise, but the State may alter the method by which it provides education in accordance with the welfare of its people.

(3) Any provision which the State makes must not

violate the principle laid down in *Brown* v. *Board of Education.*

(4) The principle decided in *Brown* v. *Board of Education* is that the State may not on racial grounds restrain the liberty of any person from access to an education in public schools.

(5) *Brown* does not require education in publicly owned and operated schools, nor does it require that any person attend publicly owned and operated schools.

(6) Motive or purpose of a legislative body does not make unconstitutional legislative action which is otherwise constitutional.

(7) The liberty of parents to select the teacher and the school in which the child is trained is protected against federal infringement by the Fifth Amendment and against state infringement by the Fourteenth Amendment, and the freedom to select associates and to be protected in one's associations is guaranteed by the First Amendment against federal infringement and by the Fourteenth against state infringement.

We agree with all that is said with respect to the importance of education. We submit, however, that its importance does not impair the Tenth Amendment reserves of the field of education to the states and to the people. If changes which have been wrought by time make education a matter essential to national defense or welfare, then let the National Congress make provision for it, and if the power to do so is not presently given or implied in the Constitution, then let the Constitution be amended appro-

priately. The laws of Virginia stand as evidence of the importance which Virginia places upon education, for her laws advance individual liberty and, by so doing, remove obstacles which otherwise would impair education. Her laws seeks to advance education and to fit the needs of all her people.

The Virginia plan for education provides scholarships to be paid to parents in furtherance of elementary and secondary education of Virginia students in public and nonsectarian private schools other than those owned or controlled by any county, city or town. These scholarships it provides for every parent regardless of place of residence, regardless of whether public schools are operated in the locality of residence or not, and with complete freedom to the parent in selection of the school in which their child is to be educated.

In addition, Virginia law permits any county or city electing to do so to maintain and to operate public schools. All of this is declared to be the law of Virginia by the Supreme Court of Appeals. *Griffin* v. *Board of Supervisors of Prince Edward County,* 203 Va. 321, 124 S.E. 2d 227, and *County School Board of Prince Edward County* v. *Griffin,* ..... Va. ....., 133 S.E. 2d 565.

The petitioners apparently have abandoned the contention implicit in their Amended Supplemental Bill of Complaint (1) that the Virginia law required the operation of public schools in Prince Edward County; and (2) that the closing of public schools in Prince Edward violated the order of April 22, 1960.

Petitioners' first contention, (Petitioners' brief p. 20) that due process requires education in public schools, is

advanced hopefully, but with no support of authority so construing the due process clause. The Department of Justice makes no such claim. We are content to rest our reply to this contention on what has been said and the authorities cited heretofore under a. and b. hereof.

The second contention of the petitioners (Petitioners' brief p. 22) is that by the exercise of the local option choice, given under the Virginia law to every county and city, by the Board of Supervisors of Prince Edward County not to levy taxes and appropriate funds for the operation of public schools is a violation of their Fourteenth Amendment rights because other counties and cities have not exercised their choice in the same manner. Therefore, say the petitioners, there is a territorial or geographical inequality and a constitutionally prohibited denial of equal protection of law. The Justice Department makes the same contention under "I" of its brief.

What we have already said in subtitle a. and b. hereof, it is submitted, disposes of this contention insofar as it is a contention that the Fourteenth Amendment requires the operation of public schools or, in fact, the provision of any form of public education.

In *James* v. *Almond*, 170 F. Supp. 331, the three-judge District Court declared:

> "We do not suggest that, aside from the Constitution of Virginia, the State must maintain a public school system. That is a matter for State determination."

And Judge Lewis, in his opinion in this case dismissing the Justice Department, stated: (R. 174)

> "This Court knows of no provision of the United States Constitution which provides that the states shall provide a system of free public education and none has been cited."

It, therefore, follows that the Constitution of the United States imposes no obligation upon the Commonwealth of Virginia to operate public schools. Since Virginia is under no such constitutional obligation she is free to refer to the various political subdivisions of the state through their governing bodies the option or choice as to the method by which education is to be provided in the particular locality.

The election of the governing body is not an election to have no education, it is simply an election not to have education in schools owned, operated and controlled by the local governing body, but to provide education through furtherance of the liberty of parents to select the school in which the child will be educated. It is respectfully submitted that such local option provisions of state law are not in conflict with the Fourteenth Amendment.

In *Ft. Smith L. & T. Co.* v. *Board of Improvement*, 274 U.S. 387, 47 S.Ct. 595, 71 L.ed 1115, the court said:

> "The 14th Amendment does not prohibit legislation merely because it is special, or limited in its application to a particular geographical or political subdivision of the state." (The court then cites seven (7) of its own decisions and a great number of state decisions).

Other cases to the same effect are *Salsburg* v. *Maryland*, 346 U.S. 545, 74 S.Ct. 280, 98 L.ed 281 (1953); *Ohio ex*

rel. Lloyd v. Dollison, 194 U.S. 445, 48 L.ed 1060, 24 S.Ct. 703.

In *Missouri* v. *Lewis* (Bowman v. Lewis) 101 U.S. 22, 25 L.ed 989, there was a contention that the judicial system of the State of Missouri violated the Fourteenth Amendment in that litigants in certain courts of St. Louis and neighboring counties were denied the right of appeal to the Supreme Court of Missouri while litigants in other courts of other counties of the State in similar cases had such right of appeal. The court declared:

> "* * * It (the Fourteenth Amendment) contemplates persons and classes of persons. It has not respect to local and municipal regulations that do not injuriously affect or discriminate between persons or classes of persons within the places or municipalities for which such regulations are made. The amendment could never have been intended to prevent a State from arranging and parceling out the jurisdiction of its several courts at its discretion. No such restriction as this could have been in view, or could have been included, in the prohibition that 'No state shall deny to any person within its jurisdiction the equal protection of the laws.' It is the right of every State to establish such courts as it sees fit, and to prescribe their several jurisdictions as to territorial extent, subject-matter and amount, and the finality and effect of their decisions; provided it does not encroach upon the proper jurisdiction of the United States, and does not abridge the privileges and immunities of citizens of the United States; and does not deprive any person of his rights without due process of law, nor deny to any person the equal protection of the laws, including the equal right to resort to the

appropriate courts for redress. The last restriction, as to the equal protection of the laws, is not violated by any diversity in the jurisdiction of the several courts as to subject-matter, amount or finality of decision, if all persons within the territorial limits of their respective jurisdiction have an equal right, in like cases and under like circumstances, to resort to them for redress. Each State has the right to make political subdivisions of its territory for municipal purposes, and to regulate their local government." * * *

"The 14th Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. * * * A uniformity which is not essential as regards different States cannot be essential as regards different parts of a State, provided that in each and all there is no infraction of the constitutional provision. Diversities which are allowable in different States are allowable in different parts of the same State." * * *

So it is respectfully submitted that education and the method by which it is provided, being exclusively and solely an area of legislation reserved to the states, there can be no objection based upon the fact that in one county education is provided by one method and in another county it is provided by another method. Such local laws being uniform within the territorial subdivision do not violate any federally protected right, nor do they violate the Fourteenth Amendment.

In *Ohio ex rel. Lloyd* v. *Dollison*, 194 U.S. 445, 24 S.Ct. 703, 48 L.ed 1060, the court had before it an Ohio law which permitted political subdivisions of the State to prohibit the sale of alcoholic beverages. Dollison was arrested for violating one of these local statutes. He advanced the contention that to make an act a crime in one political subdivision and for the State to permit it in another territory or political subdivision was a denial of equal protection under the Fourteenth Amendment. The court said:

> "This objection goes to the power of the state to pass a local option law; which, we think, is not an open question. The power of the state over the liquor traffic we have had occasion very recently to decide. We said, affirming prior cases, the sale of liquor by retail may be absolutely prohibited by a state. Cronin v. Adams, 192 U.S. 108, 24 S.Ct. 219. That being so, the power to prohibit it conditionally was asserted, and the local option law of the state of Texas sustained."

See *Rippey* v. *Texas*, 193 U.S. 504, 48 L.ed 767, 24 S.Ct. 516.

We do not need to go so far as to meet the question of the State's power to do away with education for its citizens entirely and to leave that wholly for private provision, for Virginia merely gives an option as to the method of providing education.

If, as we think may not be controverted, education is a matter lying wholly within the determination of the State, then there is no question of the right of the State to give to each political subdivision an option of choice of methods for its provision.

The decision of the local subdivision not to operate public schools, but to provide for education by scholarship aid to parents, being uniform in its application within the territorial limits of Prince Edward County, clearly under these decisions of the Supreme Court does not violate the Fourteenth Amendment.

The fact that other localities may exercise the choice given them differently from the manner in which it has been exercised in Prince Edward County in no way effects the principle laid down in these decisions. Clearly, these provisions of Virginia law, which have been fixed in the Constitution of the State of Virginia for over sixty years, do not infringe rights guaranteed by the Fourteenth Amendment. It has been so held in numerous controlling decisions of the lower federal courts. *Tonkins* v. *City of Greensboro*, 162 F. Supp. 549, aff'd. per curiam 4 Cir., 276 F. 2d 890; *Gilmore* v. *City of Montgomery*, 176 F. Supp. 776, aff'd. 5 Cir., 277 F. 2d 364; *Clark* v. *Flory*, 141 F. Supp. 248, aff'd. per curiam 4 Cir., 237 F. 2d 597; *Willie* v. *Harris County*, 202 F. Supp. 549; *Hampton* v. *City of Jacksonville*, 304 F. 2d 319; *Hampton* v. *City of Jacksonville*, 304 F. 2d 320.

We will not undertake to analyze all of these cases. The principle is laid down in *Tonkins* v. *City of Greensboro*, *supra*. The City of Greensboro sold a swimming pool for the sole purpose of avoiding the duty imposed upon it to permit use of the pool by both Negro and white residents. In holding that this action did not violate any right of the Negro complainant, the court said:

> "In the final analysis, the plaintiffs can only complain of discrimination or unequal treatment. If the swimming pools are closed to all, or disposed of through a

bona fide public sale, there can be no unequal treatment and, therefore, no racial discrimination. No citizen of Greensboro will have access to municipal swimming facilities.

"Unless persons under the same circumstances and conditions are treated differently there can be no discrimination. No person has any constitutional right to swim in a public pool. All citizens do have the right, however, if a public swimming pool is provided, not to be barred therefrom solely because of race or color. If the swimming pools are closed or sold, the rights of all groups will be equal, and it must follow that the closing or sale will not discriminate against anyone."

To the same effect are the other cases cited. Since these cases will be analyzed in the brief filed on behalf of the Attorney General, we will not extend this brief by a detailed analysis of each of these cases.

Nothing has been decided in the other school cases cited by the petitioners and the Attorney General which is in conflict with the contentions here made. In none of those cases was it held that the powers of either the State or the political subdivision are frozen so that they must operate public schools and so that they may not alter the method of education so as to provide scholarships paid to parents in aid of the education of children.

James v. *Almond*, 170 F. Supp. 331, decided in 1959 contemporaneously with *Harrison* v. *Day*, 200 Va. 439, 106 S.E. 2d 636, declared unconstitutional a fundamental part of Virginia's "massive resistance" program, and *Harrison* v. *Day* destroyed the remainder thereof. Under Virginia

statutes the Governor undertook to take over schools in the City of Norfolk (a part of that city's school system) when those schools were ordered to be integrated. The court held that this constituted a violation of the equal protection rights of the petitioners. The court did not undertake to examine the Virginia constitutional arrangement for the operation of public schools, since the discrimination here was present on a local basis in that integrated schools were closed and other schools and grades were left open. The court said:

> "In so holding we have considered only the Constitution of the United States as it is unnecessary, in our opinion, to pass upon the specific provisions of the Constitution of Virginia which deal directly with the free public school system of the state. We do not suggest that, aside from the Constitution of Virginia, the state must maintain a public school system. That is a matter for state determination." * * *

It further said at page 339:

> "Where a state or local government undertakes to provide public schools, it has the obligation to furnish such education to all in the class eligible therefor on an equal basis." * * * *

So that this opinion is not a holding that the Virginia school system is a centrally owned, controlled and operated school system, nor is it a holding that local optional control of the method of providing education is a violation of the Fourteenth Amendment. The decision, therefore, does not meet and is not authority for the issues here under consideration.

James v. *Duckworth*, 170 F. Supp. 342, is equally inapplicable.

In that case the City Council of Norfolk had levied the tax and made an appropriation to the Norfolk School Board of public funds for the operation of the Norfolk City Schools. It undertook to adopt a resolution cutting off this appropriation for use in any school which was integrated. The court simply held that this resolution, being racial in character, was a violation of the Fourteenth Amendment and was void. The effect was to remove interference with and continue in force the prior appropriation to the school board. Plainly, this decision has nothing to do with the issues here.

We cannot extend this brief by a detailed analysis of all the enactments and litigation which arose from the effort of the State of Arkansas to continue segregated public schools. It is sufficient to say that in all those cases the effort was to transfer public school buildings and public school funds into the hands of private cooperatives for the operation of public schools. These schools retaining their public nature, all these statutes were held unconstitutional.

One of these cases apparently most relied upon by the petitioners is *Aaron* v. *McKinley*, 173 F. Supp. 944. That opinion begins with a finding that the Constitution of the State of Arkansas sets up a centrally operated, financed and controlled system of public schools for the education of the people of Arkansas. There was no effort to alter this fundamental arrangement for education and consequently no question involving a change in the method of education was involved in that case. What was involved were statutes closing public schools which might be integrated and leaving other schools in the district open, cutting off funds from

schools which might be integrated, but still leaving funds available for other schools in the district. These statutes were declared unconstitutional.

Bush v. *Orleans Parish School Board*, 190 F. Supp. 861, is another example of an effort to operate public schools on a segregated basis. An act of the legislature undertook to vest primary control of New Orleans schools in the legislature itself, "under the very acts and resolutions already declared unconstitutional by this court, and, to create, for fiscal matters, a new school board." The legislature also attempted to deny the school board control of its own funds which had been lawfully appropriated to it and which were deposited in local banks. They also undertook to replace the attorney for the school board with an attorney selected by the legislature. Again, there was no question of local choice in the method of providing education. There was no question of the power of an autonomous local body to close schools and to provide education by scholarship grants to parents. Involved only was a raw exercise of state power to compel the operation of public schools with public moneys under control of state agencies in violation of the holding of the Supreme Court in *Brown* v. *Board of Education*.

Hall, v. *St. Helena Parish School Board*, 197 F. Supp. 649, is no different and represents another such effort. The controlling fact in that opinion again is the quotation from the Louisiana Constitution contained in the opinion:

> "The Legislature shall have full authority to make provision for the education of the school children of this State and/or for an educational system which shall include all public schools * * * operated by State agencies * * *."

It quoted from some Louisiana decisions construing this constitutional provision:

> "Public education is by the Constitution to be an affair of the State, and *it assumes the whole responsibility of public education* * * *." (Emphasis supplied)

It found as a fact:

> "There can be no doubt about the character of education in Louisiana as a State, and not a local, function. The Louisiana public school system is administered on a statewide basis, financed out of funds collected on a statewide basis, under the control and supervision of public officials exercising statewide authority under the Louisiana Constitution and appropriate State legislation."

In the face of these provisions of its own Constitution, Louisiana undertook to enact a so-called local option law, and the related legislation, the court said was "designed to continue racial segregation in the public schools, in spite of the desegregation order of this court." This act provided for a vote of the people of the parish on the question of closing schools. It also provided that in event of an affirmative vote, the parish board might sell or lease the schools on such terms as it might prescribe, "presumably" said the court, "to educational cooperatives, created pursuant to Act 257 of 1958 which would operate the schools." These cooperative schools, said the court, "are to be supervised by the parish school boards under the State Board of Education." The court pointed out in the opinion:

> *"Financial aid is direct from state to schools; tuition*

checks are to be made out by the state jointly to the parent and the school." (Emphasis supplied)

The state was to furnish children in the so-called private schools with school lunches and with transportation. And, the court said:

> "The program is to be administered by the State Board of Education with the assistance of each local board."

Under another of the Acts "the salaries to be paid teachers, bus drivers, school lunch workers, janitors and other school personnel in the 'private' school were established by state legislation."

By another Act it was made a crime for any person to advise parents to send children to an integrated school. Of this arrangement this court said:

> "Of necessity, the scheme required such extensive state control, financial aid, and active participation that in operating the program the State would still be providing public education." * * *

The holding of the court was that equal protection in *Brown* v. *Board of Education* was violated by the operation of public schools under the guise of "private" schools. The court did not hold that public schools must be operated. It did not hold that there is a requirement for operation of schools attended by both white and Negro children. It did not hold that the state could not grant to a locality at the option of its governing body the choice or option to educate all children within the territorial juris-

diction either in public schools or, if it so elect, by the payment of scholarship grants to parents for the education of children in schools of the parents' choice.

So that it is submitted that nothing in any of these cases meets or controls the issues raised in this case.

The Attorney General, in his brief, takes the position that the exercise of the local option granted under Virginia law in this case is not permissible under the Fourteenth Amendment for two reasons:

First, because the territorial classification is arbitrary and capricious; and, second, because the reason or motive or purpose is to preserve segregation and that this contaminates the option exercised.

We have already dealt with the law applicable to the consideration of motive in determination of the constitutionality of legislative action. We will now undertake further consideration of these objections.

The Board of Supervisors of Prince Edward County have not acted in defiance of any court order. They take an oath to support the Constitution of the United States, as do all public officers of the State of Virginia. (§49-1, Code of Virginia, 1950) Their official actions, like the laws enacted by all legislative bodies, are presumed to be constitutional and this presumption applies to the motives which prompt their action. There is nothing of defiance or unconstitutionality in a decision of that Board to adopt a method for the education of children which enables parents to exercise the liberty of choice of the school in which their children are educated—a liberty protected under both the First and

Fifth Amendments to the Constitution of the United States, and against State action under the Fourteenth Amendment.

The provision of the Constitution of Virginia giving the local Board of Supervisors absolute control over the appropriation of funds for the operation of public schools and giving the local School Board absolute control of the establishment, maintenance and operation of the schools themselves is predicated upon a basic fact which it is not believed will be controverted by any person.

The success of a local educational program depends upon the cooperation and support of the people of the locality and an effective educational program cannot be conducted without that support. This necessity the second opinion in *Brown* v. *Board of Education* recognized and directed that it should be given consideration.

Prince Edward County is a typical southern rural Virginia county. The Negro people of the county are not separated by residence as they are in the urban areas of the large cities of the east and midwest, nor even to the extent that they are so residentially separated in the urban areas of the south.

This record shows that there are approximately 1800 Negro school children and approximately 1300 white school children in the county. There is no constitutional method, or at least so it has appeared to the Board of Supervisors of Prince Edward County, by which public schools could be operated in the county in accord with the provisions of *Brown* v. *Board of Education* except to assign pupils to school on the basis of their residence. In Prince Edward this would result in immediate and complete and total in-

tegration. The effect thereof, and it is submitted that the Board of Supervisors of Prince Edward are in a better position to judge this than any other body anywhere, would be the complete destruction of education in the county. Believing as they do that parents have a constitutionally protected right to rear their children and to provide for the education and training of their children in schools of the parents' choice, they saw no alternative under the law except to exercise the option granted under the Virginia school plan and to implement the liberty of parents to choose the schools of their children. It is submitted that this is not an unconstitutional motive, but that it is a judgment controlled by realities and by facts which must be recognized by any responsible body undertaking to provide for education under the conditions as they actually exist in Prince Edward County.

If these are not a sufficient factual basis upon which to justify the exercise of the option provided under Virginia law, then we refer the court to the expressions of those of greater knowledge and learning.

The Virginia "Freedom of Choice" program for education is not a new concept or innovation created by Virginia. It is the method suggested by John Stuart Mill for universal education in his "Essay on Liberty" (N. Y., Appleton, Century, Crofts, 1947), p. 108, et seq. It is the method that has been used by the Congress of the United States for the education of members of the Armed Forces of the United States after World War II and the Korean War. (See Servicemen's Adjustment Act, 38 USCA 1501, et seq.). It is the method provided by the Congress in the National Defense Education Act of 1958. It cannot be characterized as a method of education which is designed to discriminate

because, as a matter of law, it furthers and enhances complete and absolute freedom of choice without let or hindrance.

Some of the advantages of such a system of education are discussed in great detail in an article published in the "New Individualist Review", Vol. 3 No. 1 Summer 1963, Ida Noyes Hall, University of Chicago, Chicago 37, Illinois, by Professor Robert L. Cunningham, an associate professor of Philosophy at the University of San Francisco. He gives the following as advantages of the method of education:

(1) Effective control of the education of the child is in the hands of the parents.

(2) It eliminates the possibility of dangerous public control of the power of the state to dominate the formation of the minds of the young.

(3) It would introduce a competitive element into the elementary and secondary school program which would improve the quality of education for all.

(4) It would result in an economy in education.

He also discusses in this article some of the criticisms such as the suggestion that such a plan would be "divisive". He does not find that these criticisms are justified.

Professor Milton Friedman of the University of Chicago in his recent book *"Capitalism And Freedom"*, advocates a system of education substantially similar to that provided under the Virginia law in Chapter 6 under the title, "The Role of Government in Education". In the following chapter

entitled "Capitalism and Discrimination", he concludes the chapter with the following comment upon the Virginia "Freedom of Choice" plan:

> "Segregation in schooling raises a particular problem not covered by the previous comments for one reason only. The reason is that schooling is, under present circumstances, primarily operated and administered by government. This means that government must make an explicit decision. It must either enforce segregation or enforce integration. Both seem to me bad solutions. Those of us who believe that color of skin is an irrelevant characteristic and that it is desirable for all to recognize this, yet who also believe in individual freedom, are therefore faced with a dilemma. If one must choose between the evils of enforced segregation or enforced integration, I myself would find it impossible not to choose integration.
>
> "The preceding chapter, written initially without any regard at all to the problem of segregation or integration, gives the appropriate solution that permits the avoidance of both evils—a nice illustration of how arrangements designed to enhance freedom in general cope with problems of freedom in particular. The appropriate solution is to eliminate government operation of the schools and permit parents to choose the kind of school they want their children to attend. In addition, of course, we should all of us, insofar as we possibly can, try by behavior and speech to foster the growth of attitudes and opinions that would lead mixed schools to become the rule and segregated schools the rare exception.
>
> "If a proposal like that of the preceding chapter were

adopted, it would permit a variety of schools to develop, some all white, some all Negro, some mixed. It would permit the transition from one collection of schools to another—hopefully to mixed schools—to be gradual as community attitudes changed. It would avoid the harsh political conflict that has been doing so much to raise social tensions and disrupt the community. It would in this special area, as the market does in general, permit co-operation without conformity.

"The state of Virginia has adopted a plan having many features in common with that outlined in the preceding chapter. Though adopted for the purpose of avoiding compulsory integration, I predict that the ultimate effects of the law will be very different—after all, the difference between result and intention is one of the primary justifications of a free society; it is desirable to let men follow the bent of their own interests because there is no way of predicting where they will come out. Indeed, even in the early stages there have been surprises. I have been told that one of the first requests for a voucher to finance a change of school was by a parent transferring a child from a segregated to an integrated school. The transfer was requested not for this purpose but simply because the integrated school happened to be the better school educationally. Looking further ahead, if the voucher system is not abolished, Virginia will provide an experiment to test the conclusions of the preceding chapter. If those conclusions are right, we should see a flowering of the schools available in Virginia, with an increase in their diversity, a substantial if not spectacular rise in the quality of the leading schools, and a later rise in the

quality of the rest under the impetus of the leaders.

"On the other side of the picture, we should not be so naive as to suppose that deep-seated values and beliefs can be uprooted in short measure by law. I live in Chicago. Chicago has no law compelling segregation. Its laws require integration. Yet in fact the public schools of Chicago are probably as thoroughly segregated as the schools of most Southern cities. There is almost no doubt at all that if the Virginia system were introduced in Chicago, the result would be an appreciable decrease in segregation, and a great widening in the opportunities available to the ablest and most ambitious Negro youth."

It is to be borne in mind that the court is here dealing not simply with Prince Edward County and what it might feel is a recalcitrance on its part, but the issue and the resolution of it will have national effect. The more narrow this court draws the limits around the power of the state to alter and to change its program of education, the more rigid and the less elastic becomes the opportunity of all states, consequently of the American education system, to experiment and to adjust to not only racial and sociological problems, but to scientific changes and to the increased knowledge which we are so rapidly acquiring of the processes of learning.

If states and localities are to be required to teach only in school houses owned, operated and controlled by state or political subdivisions, the opportunities of growth in the technical and scientific methods of teaching and learning will be to that extent limited. Virginia at this very moment is spending large sums of money in study and experiment

with closed circuit television and its teaching advantages. What the future holds in this field, as in so many others, no man can guess.

The Constitution of the United States is designed to live forever and to bestow upon the people of our country the blessings of liberty. It has not been the experience of history that to increase the liberty of our people threatens danger, but that on the contrary the growth and development of America has been the result of the freedom which our Constitution was designed to protect for all generations.

It is not possible to limit the freedom of parents in Prince Edward County without limiting the freedom of America. It is not possible to restrain and to confine the educational methods of the Commonwealth of Virginia to a school building owned, operated and controlled by a state agency without restraining and confining the liberty of all states within the same limits.

So that we submit that the motives and purposes which lie behind the action of the State of Virginia in providing a freedom of choice to parents in education are not reprehensible motives nor are they acts of defiance, and the reasons for the adoption of the freedom of choice program in Virginia and the reasons for its introduction into Prince Edward County support it as a constitutional exercise of a local option power and its classification is neither capricious nor arbitrary, but is supported by the most salient and controlling facts.

Even those who feel that the decision in *Brown v. Board of Education* was legally and morally wise and judicious

are compelled to recognize the great problem which it thrusts into the educational system of those areas of our country whose customs and laws for so long a time, under the sanction of the Constitution, provided for the separation of the races in education. The sociological consequences and results of that decision are just beginning to become apparent. They are by no means limited to the South. We all know that the instincts of parents to protect and to nurture their children are inherent and however misguided may be their responses when they are thus based upon native instinct, common to all mankind, the results of compulsion upon them cannot be estimated. If laws which give parents freedom to educate their children in private or public schools of their choice are to be struck down because a majority of those parents in the exercise of their freedom may make a particular choice, then there is truly no freedom in this respect and *Pierce* v. *Society of Sisters*, supra, and *Farrington* v. *Tokushige*, supra, are meaningless. If because parents in the exercise of such freedom may choose all white or all Negro or mixed schools is to be seized upon as an unlawful legislative motive which contaminates with unconstitutionality an otherwise protected freedom, then the result will be a difference in the reserved powers of the states of the Union, depending upon the particular manner in which the citizens of a state may exercise the liberty of choice. Legislation granting freedom to parents to choose the school in which the child is educated would be constitutional in states which do not have the problem here involved, or in just the manner that Prince Edward County has the problem, and would be unconstitutional in those states and communities which do. This would result in a difference of state powers based solely upon the decision of a federal court sitting in judgment of the motives of

the legislative body and of the motives of the parents in the exercise of protected liberty. Such a result would itself be violative of the United States Constitution, for that instrument contemplates "equal states" with equal reserved powers.

It is contended that there is an unconstitutional inequality which results to all citizens of Prince Edward County, and that this inequality is caused by the failure of the Board of Supervisors to levy taxes and appropriate funds for schools and results in an unconstitutional effect.

We now pass to a consideration of this question.

f. Any Inequality In Prince Edward County Is Not The Result Of Action Of The Board Of Supervisors Or Of the State

We have established the following legal conclusions:

(1) That the entire field of education is reserved to the states or to the people under the Tenth Amendment.

(2) Education being wholly a matter within the powers of the state, it also has the power to delegate to each local subdivision the choice of the method by which education shall be provided within its territorial limits, and such delegation of authority does not violate the Constitution of the United States.

(3) That differences or inequality resulting from such delegation of power as between one political subdivision and another political subdivision resulting from the different choices made by such political subdivision do not violate the Fourteenth Amendment.

In addition, the Fourteenth Amendment has no application to private action, but is wholly limited to inequality or differences resulting from state law. No inequality is claimed to exist within the county or between the citizens of the county itself, and none could be, for all were affected alike when the public schools were closed. They were closed for all and scholarships in aid of education were available to all on equal terms.

As a result of purely private decision and private action some of the children of the county have been receiving an education, and as a result of private action and private decision other children, specifically the petitioners, have experienced a lack of education. All of this has been the result of private choice and private decision and is not the result of any inequality of law either in the provisions of the law itself or in the result or effect of law within the county itself. So much at least appears to be admitted (except, of course, as to the contention that there is a federal requirement to provide education in public schools operated by the state, which we have heretofore considered in a. and b. above).

The contention is that there is a geographical inequality. Any inequality resulting from a comparison of education provided within Prince Edward County with education provided outside the county we submit does not fall within the Fourteenth Amendment prohibitions.

The reason is that inequality within the county being due to the private choice of parents refusing to utilize the scholarships available and refusing to accept the means provided for the education of their children, the same inequality or lack of education remains the result of private

action when compared with education in any other political subdivision, whatever may be the means by which education is provided in such other political subdivision.

To state it differently, the burden is upon the petitioners to show that the Fourteenth Amendment is violated. The burden is upon them to produce evidence to show that the lack of education of which they complain is the result of law and is not the result of their own private refusal to accept the means provided by law for their education. This they cannot show for the facts demonstrate the exact opposite to be the truth.

The school buildings owned by the School Board have been offered for the use of petitioners at no expense. (R. 176) The money to employ teachers and faculty has been available through scholarships. All that has been lacking has been the cooperation and acceptance by the petitioners of the scholarship funds provided.

There is presently in operation within the county a private school which provides education equal to that offered anywhere in Virginia. The same facilities are available with scholarship funds, which are now supported by private contributions. All that is required to provide the same education which is now being provided in the county by private contributions is that the school make a tuition charge and the parents apply for the scholarship funds. The demonstration is conclusive that any lack of education heretofore or in the future is not the result or effect of the means provided by law, but is and will be the result and effect of a private refusal of parents to accept and utilize the means provided.

The school buildings are and will be available. The faculty is and will be available. The money is and will be available.

The lower court found that there were 1800 Negro children who were not in school. Assuming 600 of these to be high school and 1200 elementary, at the minimum provided under the scholarship law there is $420,000.00 available annually, in addition to the buildings presently in use.

The Justice Department points out in its brief that the per pupil cost in the Foundation schools for the year 1959-60 was $216.09. With the buildings made available by the School Board, the cost of providing education for petitioners would certainly be no more than the scholarship funds available.

So that it is submitted that any lack of education for petitioners is the result of private decision and is not the result of any law in force in Prince Edward County. This private decision is the cause of any difference which results within the county and is necessarily the cause of any claimed inequality in comparison with any other county. The record permits no other factual conclusion.

5.

STATUTES AND ORDINANCES PROVIDING SCHOLARSHIPS TO BE PAID TO PARENTS IN FURTHERANCE OF THE EDUCATION OF THEIR CHILDREN IN SCHOOLS OF THEIR CHOICE MAY NOT BE ENJOINED

Before going to the principal issue raised under this subject, we wish to briefly mention the tax credit ordinance

and the local scholarship ordinance, each enacted by the Board of Supervisors in July, 1960.

Since the ordinance granting the tax credits for contributions to non-profit, non-sectarian, private schools within the county has been repealed by resolution of the Board of Supervisors adopted on the 3rd day of September, 1963,[1] we will make no detailed argument in that connection, but will simply observe that such contributions have not heretofore been held to constitute support of the institution by reason of a governmental agency allowing a tax credit therefor. Such has always been both the federal and state law.

We also wish to make a brief preliminary observation with respect to the scholarship ordinance enacted by the county. The ordinance provided for the payment of exactly the amount from county funds which the state would have made from funds otherwise coming to the county from state sources other than school funds or welfare funds. (Code §22-115.29 thru 22-115.35).

Parents whose children attended schools eligible to re-

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[1] At a regular meeting of the Board of Supervisors of Prince Edward County, held at the Court House thereof, on Tuesday, the 3rd day of September, 1963, the following resolution was, upon the motion of Mr. Gates, seconded by Mr. Dillon, unanimously adopted:

RESOLVED: That an Ordinance adopted by this Board on the 18th day of July, 1960, providing for certain tax credits for contributions made to private non-sectarian schools located within Prince Edward County be and the same is hereby repealed.

A Copy Teste:

VERNON C. WOMACK, *Clerk*
Board of Supervisors, Prince Edward County, Virginia.

ceive the state grants got exactly the same amount of money, that is $150.00 state funds plus $100.00 county funds for high school education, and $125.00 of state funds and $100.00 of county funds regardless of whether the local ordinance was enacted or not. By reason of the ordinance they got the $100.00 additional county fund directly from the county rather than receiving it from the state with the result that the state would have withheld an equal amount of money from funds above mentioned which were otherwise due the county. So that the enactment of the county ordinance resulted in no benefit to children eligible to receive the minimum state grants. On the other hand, the parents of children attending schools not eligible to receive state scholarships became eligible to receive the county funds by reason of the fact that the county ordinance was much more liberal with respect to the requirements of the type of school attended by such children than were the requirements of the state. The county ordinance (R. 150-154) reserved large discretion to the Board of Supervisors as to the qualification of the school attended by the child, required only a "systematic course of education or training", and was, in fact, an effort to aid those parents whose children might attend schools which would not qualify under state law for state scholarships (R. 190 through 194).

The reason for setting forth these facts is simply to show that no inference may be drawn from the adoption of the county ordinance of a purpose to aid the parents of children attending the Prince Edward Foundation schools for it gave them no benefit which they did not already enjoy. On the other hand, it conferred benefits upon parents whose children were not eligible for state grants and is, therefore, clearly evidence of an effort by the Board of

Supervisors to aid petitioners in any effort they might make to provide education for their children. This assistance also petitioners refused to accept.

This brings us to a consideration of the state scholarship grant laws and the principle question of whether or not this court may enjoin the scholarships to parents provided by those laws.

We do not here consider the question of jurisdiction under 28 USCA 2281, which is discussed in the brief of the Attorney General of Virginia, and which we adopt for that purpose.

The first contention which we advance is that the petitioners have no standing to challenge the constitutionality of the Virginia scholarship grant law in this case. The jurisdiction of the District Court was invoked under 28 USCA 1331 and 42 USCA 1981, under 28 USCA 1343 (3) and 42 USCA 1983. The jurisdiction is, therefore, to redress the deprivation under color of state law of rights secured by the Constitution of the United States or its laws.

The Virginia statutes providing for the payment of scholarships to parents are equally applicable to petitioners and are not in any wise related to race or other unconstitutional classification. Petitioners do not contend that there is any inequality either in the scholarship grant laws themselves, nor do they contend that there has been or is any inequality in the administration of these laws.

None of the petitioners has ever applied for admission to any school attended by the children of parents who receive scholarships under these state statutes, neither in Prince Edward County nor elsewhere.

It is, therefore, clear that the tuition grant laws of the State of Virginia do not deprive petitioners of any right secured to them under the Constitution or laws of the United States. It is true that the evidence in this case suggests that it was the purpose of those who organized the schools of the Prince Edward Education Foundation to provide education for white children, nonetheless, there is no evidence that this policy or this purpose would be made effective with respect to the application of any child or children for admission to that school. If petitioners are entitled to admission to the Foundation School they have not sought the exercise of that right and, therefore, they have not been and are not being deprived of that right. If and when that question should come before the court it would involve consideration of a great many problems and factual elements which are not developed in the evidence in this case, and the right of admission of the petitioners to the Foundation Schools is not the subject of this litigation.

It is, therefore, respectfully submitted that the record fails to show that the petitioners have been deprived of any right secured under the Constitution of the United States or its laws by these statutes. *Tileston* v. *Ullman*, 318 U.S. 44, 46, 87 L. ed 603, 604, 63 S.Ct. 493; *Standard Stock Food Co.* v. *Wright*, 225 U.S. 540, 550, 56 L.ed 1197, 32 S.Ct. 784; *United States* v. *Raines*, 362 U.S. 17, 22, 4 L.ed 2d 524, 529, 80 S.Ct. 519.

Certainly the court may not grant the injunctions sought by the petitioners. The petitioners ask the court to enjoin the payment of state scholarships to parents for the education of children in schools which do not admit students because of race. We have found no case of a remotely

similar character asking a court for an injunction of such a nature. To grant the injunction in that form would constitute, in effect, an amendment of the Virginia tuition grant law by injunction. It would require that this court write into the Virginia statutes a restriction upon the use of scholarship grants, which restriction is not a part of the law as enacted by the legislature.

The statute may be attacked in a proper suit for that purpose as a violation of the rights of any person or class of persons who feel that their rights are violated by the statute. The court would then have to determine whether or not the statute as drawn violates those rights. If the court concluded that the statute did violate constitutional rights, then it would be within the power of the court to enjoin the execution or enforcement of the statute as a violation of constitutional rights, but, it is submitted, that in no event could the court by the exercise of the judicial power, in effect, rewrite the statute in accordance with the court's notion of what might be necessary to make the statute conform to its judgment with respect to the provisions of the Constitution.

The injunction, therefore, prayed for by the petitioners clearly may not be granted.

Furthermore, as has been pointed out heretofore in this brief, (4. Sub-paragraph d.), these scholarship laws being paid to parents without any racial restraint whatsoever upon their selection of the school in which their child would be educated is in furtherance of a protected freedom of those parents. If parents in their private capacity have the protected right and liberty under the Fifth Amendment of the Constitution of the United States to choose a private

school which does not admit children on a racial ground, then this liberty may not be impaired by a judgment of a federal court any more than it could be impaired by an act of Congress, (see *Farrington* v. *Tokushige, supra*), or by a state law, (see *Meyer* v. *Nebraska, supra*). If the grant may be denied for the use of a parent in a private school which excludes Negro children, it also may be enjoined in a school which excludes white children, and it may be enjoined in a school for those who speak the Japanese language or for those who speak the German language.

If under the First Amendment there is a freedom of association, then people of the Negro race have a right to associate privately to the exclusion of people of the white race and, the converse would also be true. In this area free choice to associate or not to associate as one may privately choose are preferred and protected freedoms and to put the restraint upon such freedom which would result from the injunction prayed for by the petitioners would be a gross violation of the fundamental liberty guaranteed to all persons within the jurisdiction of the United States.

Furthermore, this court has said in *Frost* v. *Railroad Commission*, 271 U.S. 583 at 594, 70 L.ed 1101 at 1105, 46 S.Ct. 605, in dealing with an effort by the State of California to deny the use of its highways to private carriers unless such private carriers submitted to regulation as common carriers:

> "But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the

> surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."

The converse of this is also true. Neither the Congress nor the federal courts can impose as a condition upon the exercise of the First Amendment freedom of association and the Fifth Amendment liberty of parents that they give up and surrender a portion of that liberty in order to enjoy a benefit granted by the state. If a state may not thus restrict and condition liberties protected under the Constitution of the United States, surely no agency of the United States may restrict the exercise of those liberties as a condition for the enjoyment of a general public benefit provided by the state.

It is not necessary to cite the multitude of cases in which this court has struck down state statutes imposing a condition upon the exercise of the right of freedom of speech.

As has been heretofore pointed out, freedom of speech and freedom of association are "cognate rights". In like manner, a federal court cannot impose a restraint or a condition upon free association as a condition to the enjoyment of a state benefit; in this instance, scholarships paid to parents with freedom to select the school and the associations of children.

The Justice Department suggests that the court may impose a restriction upon this First Amendment freedom of association and upon the liberty of parents with respect to the training of children based upon whether or not

public schools are in operation within the county of the residence of those seeking to enjoy those protected liberties. The Attorney General says that the enjoyment of these liberties, fostered by scholarship grants under state law, should not be permitted so long as public schools are closed in Prince Edward County. It is submitted that this conditioning of protected liberty and First Amendment freedom is not permissible whether it comes from a state source or from a federal source. Whether public schools are opened or closed is no basis upon which to deny protected freedom. If the closing of public schools violates the Constitution of the United States, and we think most emphatically that it does not under the circumstances here shown, that is one issue, but the existence of public schools or the non-existence of public schools may not properly be related as a condition to fundamental freedoms protected by the Constitution of the United States.

It is, therefore, respectfully submitted that the Virginia scholarship grants may not be enjoined in this litigation.

6.

DOES THE JUDICIAL POWER EXTEND TO COMPEL A LEGISLATIVE BRANCH TO MAKE A LAW, PARTICULARLY TO LEVY TAXES AND TO APPROPRIATE LOCAL REVENUE?

Nobody has ever suggested before, so far as we have been able to investigate the cases, that this court, or any other court, has the power to compel a legislative body to levy a tax and to appropriate the revenue derived therefrom against their will and without their consent.

Section 6 of Article I of the Virginia Bill of Rights as drawn by George Mason and continued in the Constitution of Virginia throughout its history down to the present day, provides as follows:

> "That all elections ought to be free; and that all men, having sufficient evidence of permanent common interest with, and attachment to, the community have the right of suffrage, and *cannot be taxed* or deprived of, or damaged in, their property for public use, *without their own consent, or that of their representatives duly elected, or bound by any law to which they have not, in like manner, assented for the public good.*" (Emphasis supplied)

Section 5 of the same Bill of Rights provides as follows:

> "That the Legislative, Executive and Judicial Departments of the State should be separate and distinct; * * *"

The division of the Legislative, Executive and Judicial Departments on the federal level is provided in the Constitution of the United States and the principle requiring consent through the representatives of the people to all taxes is carried into the Constitution of the United States in Section 7, Article I:

> "All bills for raising revenue shall originate in the House of Representatives, but the Senate may propose or concur with amendments as on other bills."

As we said above, the principle of consent through elected representatives as a fundamental prerequisite for the

imposition of taxes has never been directly challenged. The matter was discussed, however, in the case of *Thomas* v. *Gay*, 169 U.S. 264, 42 L.ed 740. Here the question arose with respect to the application of a tax imposed upon each head of cattle grazing upon certain territorial lands under the jurisdiction of the territory of Oklahoma. The claim was made that the people of the territory had no representative who had consented to the tax. The court said:

> "The most fundamental of these objections is found in the assertion that, so far as nonresident owners of cattle grazing within the Indian reservations are concerned, it is taxation without representation, and that such persons derive no benefit from the expenditure of the moneys accruing from the tax." * * *
>
> "But these principles, as practically administered, do not mean that no person, man, woman, or child, resident or nonresident, shall be taxed, unless he was represented by someone for whom he had actually voted, nor do they mean that no man's property can be taxed unless some benefit to him personally can be pointed out." * * *

We cite the case merely to show that the principle is recognized as fundamental.

The petitioners undertake to surmount this barrier by citing a series of cases which have absolutely no application to the issue here raised.

In every one of the cases cited in the brief of the petitioners on page 33, and by the Attorney General in "III 2." of its brief, there was involved a contract and a mone-

tary judgment thereon. The law on this subject is stated thus in 12 Am. Jur., § 418, page 50:

> "§418. Taxing Power as Inherent Part of Contract. —In accord with the general rule that existing laws become an integral part of the obligation of a contract, the laws relating to the rights of enforcement existing at the time of the issuance of municipal bonds under the authority of which they are issued enter into and become a part of the contract in such a way that the obligation of the contract cannot thereafter be in any way impaired or its fulfilment hampered or obstructed by a change in the law. As a result, when a contract is made with a municipal corporation on the faith that taxes will be levied, legislation repealing or modifying the taxing power of the corporation, so as to deprive the holder of the contract of all adequate and efficacious remedy, is within the constitutional inhibition as to the impairment of the obligation of contracts. Therefore, the remedies for the enforcement of such obligations assumed by a municipal corporation, which existed when the contract was made, must be left unimpaired by the legislature; or if they are changed, a substantial equivalent must be provided. Likewise, where the resource for the payment of the bonds of a municipal corporation is the power of taxation existing when the bonds were issued, any law which withdraws or limits the taxing power and leaves no adequate means for the payment of the bonds is forbidden by the Constitution of the United States and is null and void. This rule is applicable regardless of whether the legislative action is taken by the municipality or by state legislation which repeals or limits the statute authorizing the municipality to levy

taxes. The creditors of the municipality does not always have a right to have the taxes collected in the same manner as they were always collected, but he does have the right under his contract to have taxes collected in as prompt and efficacious a manner as provided at the time the contract was executed. Thus, any act which attempts to put off or retard the enforcement of a municipality's obligations by postponing the power of the city to levy taxes impairs the obligation of contract."

There is no question in these cases involving the consent of the legislative body to the levy of the tax. In these cases contracts either for the issuance and payment of bonds were entered into not in the governmental capacity of the political subdivision, but in its corporate capacity, and the contract having been entered into, the consent to pay the obligation and therefore to levy the tax necessary to pay is an inherent part of the contract itself and any change in the law with respect to the taxing power of the municipality is regarded as a prohibited impairment of the contract under the Constitution of the United States, and any refusal to levy the tax is likewise regarded as an impairment of the contract obligation, all of which is in violation of express provisions of the Constitution of the United States.

In short, the consent and obligation to levy the tax was fixed by the acceptance and commitment of the contract to pay. The enforcement by mandamus of a levy of the tax becomes in such cases a mere "ministerial act" which the courts under recognized principles of law may direct to be done.

These cases do not meet in any way the question which is suggested by the petitioners that the judiciary has the power to compel the levy of taxes without the consent of those to be taxed. Until some act may be pointed to which constitutes a consent and a commitment of the legislative tax levying authority or of the people themselves to the levy of the tax, no court has yet assumed the power as a part of its judicial authority to issue an order directing such a tax levying body to make a levy of taxes and to appropriate the revenue therefrom to a governmental purpose.

See the following authorities upon the subject of Judicial Control of the legislative power:

Where the legislative act is discretionary:

34 Am. Jur., Mandamus, § 66, 67, 68, 854 through 858

Where the legislative act is mandatory:

11 Am. Jur., Constitutional Law, § 76, 694
11 Am. Jur., Constitutional Law, § 200, 902
16 C. J. S., Constitutional Law, § 151(1), 721
Anno: 136 ALR 677
Anno: 140 ALR 439
Anno: 153 ALR 522

Levy of taxes is a legislative act not subject to judicial control:

51 Am. Jur., Taxation, § 46, 76
84 C.J.S., Taxation, § 7, 51
Anno: 32 LRA (NS) 1020

The famous case of *Virginia* v. *West Virginia*, 246 U.S. 565, 62 L.ed 882, 38 S.Ct. 400, is cited as authority to support such a power in the court. A recitation of the facts from which that case arose will make clear that it does not apply here.

This case was before the Supreme Court of the United States on nine different occasions and nine different opinions were rendered before the court rendered the opinion at the citation above given.

The litigation involved the demand of the State of Virginia that the State of West Virginia pay its proportionate part of certain indebtedness in bonds, outstanding obligations of the State of Virginia at the time West Virginia was carved out of the State of Virginia and became a separate state. The grounds of the claim are stated in an opinion by Mr. Justice Holmes in 220 U.S. 1, 25, 55 L.ed 353, 357. In substance, they are as follows:

After Virginia adopted its ordinance of secession, citizens of the area which became West Virginia organized a government which was recognized as the restored State of Virginia by the government of the United States. A convention of this restored state was convened and adopted an ordinance for the formation of a new state, which ordinance obligated the new state to "take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861." A constitution was framed for the new state which provided "an equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, shall be assumed by this state." Finally, Congress,

by an act of December 31, 1862, Chapter 6, 12 Stat. L. 633, gave its consent to the admission of the State of West Virginia with express approval of the consent of the restored State of Virginia to pay its part of the debt as provided by the ordinance above referred to and the constitution above quoted from. Upon this basis, the court held that the above quoted provisions of the ordinance of the restored State of Virginia and the Constitution of the new State of West Virginia with the approval by Congress constituted a binding obligation and promise of West Virginia to pay to Virginia her proportionate part of the public debt aforesaid. It was upon the basis of this contractual obligation that the court proceeded to determine through commissioners the fair proportion of the public debt of Virginia which should be paid by West Virginia, and after determining the amount the judgment was fixed for a sum in excess of $12,000,000.00. West Virginia continued recalcitrant to pay this judgment.

It was upon this background that the last opinion rendered by Chief Justice White at 246 U.S. 565, must be judged. We note the fact that there is no question in that case, or in any of the opinions, of the agreement of West Virginia to pay the debt. There is no question but that the Constitution of West Virginia provided that it should pay the debt, and there is no question of the fact that Congress admitted West Virginia with the understanding fixed in its Constitution that it would pay the debt. It, therefore, appears that there was fixed in the fundamental law of West Virginia through its duly elected representatives to a Constitutional Convention, a consent to the obligation, and, therefore, a consent to pay the obligation. Upon this basis therefore, the question is eliminated from the case

of *Virginia* v. *West Virginia* of imposing a tax without the consent of the representatives of the people upon whom the tax was to be levied. Consent to the tax had been given in the highest form of representation known, namely, in its Constitution, and the obligation to impose the tax to pay the debt assumed was thus fixed in its Constitution. The case, therefore, is clearly distinguished from the case here before the court.

The case is further distinguished from the issue here by the fact that the Constitution of the United States expressly confers upon the Supreme Court jurisdiction to render judgments in controversies between states, and the judgment having been rendered, the court was then confronted with the problem of how to enforce it. With respect to the exercise of judicial power upon the sovereignty of the state, the court made the following observation:

> "As it is certain that governmental powers reserved to the states by the Constitution—their sovereignty —were the efficient cause of the general rule by which they were subject to judicial power, that is, to be impleaded, it must follow that when the constitution gave original jurisdiction to this court to entertain at the instance of one state a suit against another, it must have been intended to modify the general rule: that is, to bring the states and their governmental authority within the exceptional judicial power which was created. No other rational explanation can be given for the provision."

It is, therefore, submitted that the opinion recognized that the sovereignty or political powers of the state are not

subject to judicial process except in the exceptional instance where jurisdiction is conferred directly upon the Supreme Court of controversies between states.

The court then proceeds, at page 600, to discuss the appropriate means for the enforcement of its judgment. It divides the possible means of enforcement into the legislative powers of Congress and the judicial power of the court. Congressional powers to enforce the judgment are predicated upon the approval of Congress, of the agreement between the restored State of Virginia and the new State of West Virginia; and the court concludes that the power to make valid that agreement carried with it Congressional powers to enforce it.

Without quoting at length from the opinion, at every point in the opinion the court returns to the foundation of the obligation as resting upon contracts consented to by the authorized representatives of the State of West Virginia.

In an article by Professor *Thomas Reed Powell*, 17 Mich. Law Review 1, "Coercing A State To Pay A Judgment: Virginia v. West Virginia," he concludes that the mandamus asked for by Virginia and appropriate to the case would have been a mandamus to require West Virginia *to pay the judgment*. Since, as he points out, West Virginia could pay the judgment either by levying a tax for the purpose of paying or by issuing bonds for payment. As to these alternative methods, West Virginia would have discretion, but under the judgment of the court West Virginia had no discretion as to payment.

Professor Powell says at page 22 of Volume 17 Mich. Law Review:

> "The duty which the legislature of West Virginia is now asked to perform is enjoined upon it by the law of West Virginia as embodied in its Constitution. The legislature is subject to the law of the constitution as the municipality is subject to the law of the legislature. The legislature is in the present situation an 'inferior authority' in the same sense in which the cases and the text-writers have used that term in referring to persons subject to mandamus. The duty is imposed upon it by the superior authority of the Constitution."

So that *Virginia* v. *West Virginia* is distinguished from the case here before the court in that there is a consent of the representatives of the people to the obligation which the jurisdiction of the Supreme Court of the United States reduced to judgment, and a mandamus requiring the payment of the judgment would not be a mandamus requiring an act to which the people of West Virginia had not consented through their representatives.

Virginia v. *West Virginia* stands for the proposition that while under the particular facts of that case the Supreme Court of the United States could direct the payment of the judgment, it could not control the discretion of West Virginia as to the method of payment. That is, it could not direct, on the one hand, that the legislature levy a tax, or, on the other hand, that the legislature issue bonds. It could only require under the broadest interpretation of the opinion cited that the legislature make provision for the payment of the judgment.

Even if the opinion in *Virginia* v. *West Virginia* were applicable here (and we think it is not because the element of consent to the payment of the judgment was implicit in the West Virginia Constitution), it would only authorize

a federal court to say that the Constitution and law of Virginia requires education, and it might follow therefrom in a proper case that a mandamus could be directed to the appropriate state officers to provide education, but where the State Constitution and State law authorize education to be provided either by the operation of public schools or by the payment of scholarship funds to parents in furtherance of education in schools of the parents' choice or by a combination of both methods, a mandamus could not lie to control the legislative discretion as to the method by which education is provided.

Such a mandamus is not required in this case for the obvious reason that Virginia is providing education within the terms of Virginia's Constitution and Virginia's law. The people of Virginia in her Constitution and in the enactments of the Legislature have consented that Virginia should provide education. They have not consented, however, that any county or city must provide education in any particular manner, and since the method and manner by which education is to be provided is within the reserved powers of the state, a federal court is not authorized to control the legislative discretion by directing that it be provided in a particular manner; namely, by the operation of publicly owned and maintained schools, and much less is it authorized without the consent of a legislative body to direct that taxes be levied and money be appropriated to operate such public schools.

It is further respectfully submitted that the language of the Fourteenth Amendment is negative and prohibitory. It gives the federal courts and the federal Congress power to prevent the denial of life, liberty or property without due process of law and to prevent the denial of equal protection of the law by the state. Such a provision, under the

decisions of this court, cannot be converted into authority to prescribe what a state must provide. In other words, a prohibition that no state shall deny equal protection of the law is not authority to Congress or to the federal courts to prescribe and affirmatively impose upon the states the laws which shall be enacted to provide equal protection or due process. So the Fourteenth Amendment has been interpreted from the beginning. Civil Rights Cases, 109 U.S. 1, 27 L.ed 836, ...S.Ct..... See *Wilkerson* v. *Rahrer*, 140 U.S. 546, 35 L.ed 572; *Barbier* v. *Connolly*, 113 U.S. 27, 31, 28 L.ed 924; *Ownby* v. *Morgan*, 256 U.S. 94, 112, 65 L.ed 837; *United States* v. *Harris*, 106 U.S. 629, 27 L.ed 290; *McPherson* v. *Blacker*, 146 U.S. 1, 36 L.ed 869.

CONCLUSION

Virginia law gives each locality the option to choose the method by which education will be provided for its residents. The Virginia scholarship statutes are predicated upon the constitutionally protected right of each individual parent to select the schools in which his child is educated. It eliminates the element of compulsion which results where parents may only choose between integrated public schools and private education at the parents' expense. It is the only constitutional means which has been found which holds out real hope that the educational problem of our country resulting from the radical changes wrought by *Brown* v. *Board of Education* may be solved. It is characteristic of the genius of our Constitution that the solution of such problems lie in the broadening and extending of American freedom and not in its constriction.

We close this brief with the earnest prayer that this freedom which Virginia law tries to foster will not be

taken away by this Court and with the following wise and eloquent quotation from the opinion of the late Mr. Justice Jackson speaking for the Court in *West Virginia State Bd. of Ed.* v. *Barnette*, 319 U.S. 624, 640, 87 L. ed. 1628, 1639, 63 S. Ct. 1178:

> "Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security, support of a dynasty or regime, and particular plans for saving souls. As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever increasing severity. As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing. Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.
>
> "It seems trite but necessary to say that the First

Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings. There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority."

BOARD OF SUPERVISORS OF
PRINCE EDWARD COUNTY

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NOTE: The limitations of time have contributed to the imperfections of this brief. It is too lengthy and the material is inadequately organized and presented. This we regret and ask the indulgence of the court.

In its preparation we have drawn whole sections from the work of Collins Denny, Jr., who was counsel for the School Board of Prince Edward County until his death on January 14, 1964. His magnificent talent and legal ability is a loss to the adequate presentation of the important constitutional issues here before the court. We acknowledge our indebtedness to him in the effort here made.

J. SEGAR GRAVATT

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No. 592

IN THE

Supreme Court of the United States

October Term, 1963

COCHEYSE J. GRIFFIN, ETC., ET AL.,
Petitioners,

v.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, ET AL.,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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BRIEF ON BEHALF OF THE STATE BOARD OF EDUCATION AND SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE COMMONWEALTH OF VIRGINIA.

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COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, ET AL.,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF ON BEHALF OF THE STATE BOARD OF EDUCATION AND SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE COMMONWEALTH OF VIRGINIA.

PRELIMINARY STATEMENT

On November 7, 1962, the State Board of Education of the Commonwealth of Virginia and the Superintendent of Public Instruction of the Commonwealth of Virginia—hereafter referred to jointly as the State Board—filed a cross-appeal in the United States Court of Appeals for the Fourth Circuit from orders entered on October 10, 1962, by the United States District Court for the Eastern

District of Virginia (a) overruling the State Board's motion to dismiss the amended supplemental complaint (b) declining to abstain from determining the issues presented by the amended supplemental complaint (c) restraining and enjoining the State Board from processing or approving any applications for State scholarship grants from persons residing in Prince Edward County so long as the public schools of Prince Edward County remain closed and (d) holding generally that the public schools of Prince Edward County may not be closed to avoid the effect of the law of the land as interpreted by the Supreme Court while the Commonwealth of Virginia permits other public schools to remain open at the expense of the taxpayers, if this portion of said judgment orders has such finality as permits appeal (R. 114).*

On August 12, 1963, the Court of Appeals vacated the judgments of the District Court and remanded the cause with instructions to abstain from conducting further proceedings until the Supreme Court of Appeals of Virginia had decided the then pending case of *County School Board of Prince Edward County, Virginia, et al.* v. *Leslie Francis Griffin, Sr., et al.*, and that decision had become final, with leave thereafter to entertain such further proceedings and enter such further orders as might then appear appropriate in light of the determinations of State law by the Supreme Court of Appeals of Virginia (R. 228, 229, 237, 238).

This judgment of the Court of Appeals was subsequently stayed by Mr. Justice Brennan on September 30, 1963, "pending the timely filing and disposition of a petition for a writ of certiorari." The case is now before this Court upon petition for certiorari allowed on January 6, 1964 (R. 240).

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* All references (R) are to pages in the printed record.

STATEMENT OF THE CASE

The State Board accepts and adopts the statement of the case set out in the joint brief on behalf of the County School Board and the Division Superintendent of Schools of Prince Edward County. Such facts in the case as may be particularly pertinent to the cross-appeal of the State Board and not included in the adopted statement of the case will be specifically stated in the body of this brief with appropriate references.

QUESTIONS PRESENTED ON APPEAL

The Notice of Appeal and the Motion to Dismiss which were filed on behalf of the State Board in this case are set out in the printed record. (R. 114-117). The following questions are presented in this case:

1. Does the amended supplemental complaint allege a new and distinct cause of action different from that set out in the original complaint? (Motion to Dismiss, Ground 1).

2. Is the instant suit one against the Commonwealth of Virginia within the prohibition of the Eleventh Amendment to the Constitution of the United States? (Motion to Dismiss, Ground 2).

3. Does the amended supplemental complaint state a claim against the State Board upon which relief can be granted? (Motion to Dismiss, Grounds 3 and 6).

4. Does the amended supplemental complaint seek relief which can only be granted by a District Court of three judges in accordance with 28 U.S.C.A. 2284? (Motion to Dismiss, Ground 5).

5. Are State scholarships available under Section 22-115.29 *et seq.* of the Virginia Code to persons residing in Prince Edward County while the public schools of such county are closed?

6. May the public schools of Prince Edward County be closed to avoid their operation on a racially integrated basis while public schools remain open in other localities of Virginia?

SUMMARY OF ARGUMENT

The instant respondents, State Board of Education and Superintendent of Public Instruction of the Commonwealth of Virginia, were not parties to the original school desegregation suit commenced in 1951 as *Davis* v. *County School Board of Prince Edward County* and decided here under *Brown* v. *Board of Education*, 347 U. S. 483, 349 U. S. 294. On the contrary, the instant respondents were first made parties to this litigation by the amended supplemental complaint filed April 24, 1961. Since the entry of the order of the District Court permitting the amended supplemental complaint to be filed these respondents have consistently asserted—and continue to assert before this Court—various objections and defenses to the contentions of the petitioners.

Initially, we submit that the amended supplemental complaint alleges a new and distinct cause of action which is entirely different from that set out in the original complaint. The relief sought requires the joining of additional defendants who were not parties to the original complaint. The pleading before this Court states no cause of action against the original defendants and may not properly be filed as an amended supplemental complaint.

Moreover, we assert that the amended supplemental complaint seeks a peremptory writ of mandamus commanding these respondents, *inter alia*, to operate public schools in Prince Edward County. As such, it seeks to compel affirmative action by officials of the State in the performance of an alleged obligation of the Commonwealth of Virginia. A suit requesting such relief is, in its direct purpose and effect, a suit against the State within the prohibition of the Eleventh Amendment to the Constitution of the United States.

Furthermore, we contend that the amended supplemental complaint fails to specify any provision of the Constitution or statutes of Virginia which these respondents have failed or refused to exercise and that the amended supplemental complaint therefore fails to state a claim upon which relief can be granted against these respondents.

In addition, we submit that the amended supplemental complaint seeks to enjoin the operation, execution and administration of a State statute upon the ground that the statute in question is unconstitutional. The federal judicial power in such a case is exclusively vested in a District Court of three judges in accordance with 28 U.S.C.A. 2284.

Referring to these contentions, the Court of Appeals for the Fourth Circuit pointed out (322 F (2d) at 335):

> "For the District Court to get to the merits, it had to bypass a number of preliminary questions, including the very troublesome question arising under the Eleventh Amendment, all of which are brought up before us."

Due process of law requires that the above-stated contentions of these respondents cannot be ignored and must receive judicial review at some stage in these proceedings.

The District Court enjoined the execution and administration of the Virginia tuition grant statute upon the ground that such statute did not authorize payment of tuition grants for the education of children residing in localities in which public schools were not operated. On this point we insist that the District Court not only incorrectly interpreted the statute in question but also lacked jurisdiction to enjoin the statute upon the stated ground.

Finally, we submit that no provision of the Federal Constitution requires any State to operate public schools. In Virginia, the question of whether or not public schools shall be operated in a particular locality is referred to the governing body of each political subdivision by local option provisions of the Constitution of Virginia. Such local option provisions have been in effect in Virginia for more than sixty years and are constitutionally unassailable. Election by any political subdivision to discontinue the operation of public schools, rather than operate such schools on a racially integrated basis, infringes no constitutional right of the citizens of such locality. Moreover, federal courts have no judicial power to require any local governing body to levy taxes, appropriate funds and operate public schools in that locality.

ARGUMENT

I.

The Amended Supplemental Complaint Alleges A New And Distinct Cause Of Action Different From That Set Out In The Original Complaint.

This question has been discussed at length, and the applicable law thoroughly developed, in the brief on behalf of the County School Board and Division Superintendent of Schools of Prince Edward County. The State Board fully

agrees with the position there taken and adopts the statements there made as its argument upon this question.

II.

The Instant Suit Is One Against the Commonwealth of Virginia Within the Prohibition of the Eleventh Amendment to the Constitution of the United States.

The principal relief requested by the amended supplemental complaint in the case at bar is a *preremptory writ of mandamus* commanding the State Board, the local school board and the local board of supervisors to operate public schools in Prince Edward County. Of course, this relief is not requested in so many words; indeed, the term "writ of mandamus" does not appear in the prayer of the amended supplemental complaint. Instead, plaintiffs requested the District Court to enjoin and restrain the above mentioned parties:

> "(a) From refusing to maintain and operate an efficient system of public free schools in Prince Edward County, Virginia; . . ." (R. 27).

Counsel for the State Board submit that a suit requesting such relief is, in its direct purpose and effect, a suit against the Commonwealth of Virginia, which has not consented to be sued, and that the judicial power of the United States does not extend to such a suit.

The Eleventh Amendment to the Constitution of the United States provides:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State."

Although the express language of the amendment under consideration would appear to prohibit only those suits against a State which are instituted by citizens of another State or of a foreign State, it is now well established that the amendment deprives Federal courts of the judicial power to entertain suits brought against a State by its own citizens. *Hans* v. *Louisiana*, 134 U. S. 1, *Ex parte New York*, 256 U. S. 490.

The construction placed upon the amendment by the above cited decisions is consistent with the observation of this Court in *Ex parte Ayers*, 123 U. S. 443, 505, that:

> "To secure the manifest purpose of the constitutional exemption guaranteed by the Eleventh Amendment requires that it should be interpreted, not literally and too narrowly, but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose."

So fundamental is the immunity conferred upon States by the Eleventh Amendment that it may be waived only by the State Legislature, and no official, by any act, can waive the immunity in question in the absence of a statute expressly conferring the State's consent to suit. *Ford Motor Co.* v. *Department of Treasury*, 323 U. S. 459; *Great Northern Life Ins. Co.* v. *Read*, 322 U. S. 47; *Parish* v. *State Banking Board*, 235 U. S. 498; *Title Guaranty & S. Co.* v. *Guernsey*, 205 F. 91; *Deseret Water, Oil & Irig. Co.* v. *California*, 202 F. 498, *cf.*, *Stanley* v. *Schwalby*, 162 U. S. 255; compare *Gunter* v. *Atlantic Coast Line R. Co.*, 200 U. S. 273.

Whether or not a particular action constitutes a suit against a State within the prohibition of the Eleventh Amendment is not determined by the identity of the parties named as defendants of record, but by the essential char-

acter of the proceedings, the relief requested and the result of the judgment or decree which may be entered. *Minnesota* v. *Hitchcock*, 185 U. S. 373; *Ex parte, New York, supra; cf., Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U. S. 682. This rule was well stated by this Court in *Ex parte New York, supra*, at 500, in the following language:

> "As to what is to be deemed a suit against a State . . . it is now established that the question is to be determined not by the mere names of the titular parties but by the essential nature and effect of the proceeding, as it appears from the entire record."

Suits against officers of a State in their official capacity to compel affirmative action on their part or "the performance of an obligation which belongs to the State in its political capacity," constitute suits against a State which Federal courts are without authority to entertain under the Eleventh Amendment. *Louisiana* v. *Jumel*, 107 U. S. 711; *Cunningham* v. *Macon & B. R. Co.*, 109 U. S. 446; *Hagood* v. *Southern*, 117 U. S. 52; *North Carolina* v. *Temple*, 134 U. S. 22; *cf., Pennoyer* v. *McConnaughy*, 140 U. S. 1; *Great Northern Life Ins. Co.* v. *Read, supra*.

This governing principle was dispositively enunciated in *Louisiana* v. *Jumel, supra*, in which case a suit for an injunction against State officials (to prohibit such officials from refusing to make payment on certain bonds and from refusing to collect taxes for future payments) instituted in a Federal court and a companion suit for mandamus (to compel the same officers to make such payments and collect such taxes) instituted in a State court were, upon removal of the latter suit, heard together in the Federal court. Holding that the two suits might "properly be considered to

gether . . . because they present substantially the same questions" and that both suits constituted suits against a State prohibited by the Eleventh Amendment, the Court declared (107 U. S. at 727-728):

> "Little need be said with special reference to the suit for *mandamus*. In this no trust is involved; but the simple question presented is, whether a single bondholder, or a committee of bondholders can, by the judicial writ of *mandamus*, compel the executive officers of the State to perform generally their several duties under the law . . . What they ask is that the auditor of state, the treasurer of state, and the board of liquidation may be required to enforce the Act of 1874, and 'carry out, perform and discharge each and every one of the ministerial acts, things and duties respectively required of them * * * according to the full and true intent and purport of that Act.' . . . The remedy sought, in order to be complete, *would require the court to assume all the executive authority of the State, so far as it related to the enforcement of this law, and to supervise the conduct of all persons charged with any official duty* in respect to the levy, collection and disbursement of the tax in question until the bonds, principal and interest, were paid in full, and that, too, in a proceeding to which the State, as a State, was not and could not be made a party. It needs no argument to show that the political power cannot be thus ousted of its jurisdiction and the judiciary set in its place. When a State submits itself, without reservation, to the jurisdiction of a court in a particular case, that jurisdiction may be used to give full effect to what the State has by its act of submission allowed to be done; and if the law permits coercion of the public officers to enforce any judgment that may be rendered, then such coercion may be employed for that purpose. But this is very far from authorizing the courts, when a State cannot be sued, to set up its jurisdiction over the officers in

charge of the public moneys, so as to control them as against the political power in their administration of the finances of the State. In our opinion, to *grant the relief asked for in either of these cases*, would be to exercise such a power." (Italics supplied)

In *Hagood* v. *Southern*, *supra*, suits were instituted by the holders of certain revenue bond scrip of the State of South Carolina against various officials of that State to require such officers to redeem the certificates in question, to receive them in payment of taxes and to collect special taxes pledged for the payment of such certificates by statute. Reversing decrees of the trial court which granted the requested relief, and remanding the causes with instructions to dismiss the bills of complaint, the Court observed (117 U. S. at 69, 70):

"If this case is not within the class of those forbidden by the constitutional guaranty to the States of immunity from suits in federal tribunals, it is difficult to conceive the frame of one which would be. * * * A judgment against these latter, [State officials] in their official and representative capacity, *commanding them to perform official functions on behalf of the State according to the dictates and decrees of the court*, is if anything can be a judicial proceeding against the State itself.

* * *

"A broad line of demarcation separates from such cases as the present, in which the decrees require by affirmative official action on the part of the defendants, the performance of an obligation which belongs to the State in its political capacity, those in which actions at law or suits in equity are maintained against defendants who, while claiming to act as officers of the State, violate and invade the personal and property rights of the plaintiffs, under color of authority, unconstitutional and void." (Italics supplied)

Similarly, in *North Carolina* v. *Temple, supra*, a bill in equity was filed by various bondholders to compel the Auditor of the State of North Carolina to raise a tax for the payment of the arrears of interest on certain State bonds. Instructing the trial court to dismiss the bill of complaint, the Court succinctly stated (134 U. S. at 30):

> "We think it perfectly clear that the suit against the auditor in this case was virtually a suit against the State of North Carolina. In this regard it comes within the principle of the cases of *Louisiana* v. *Jumel*, 107 U. S. 711 [27:448]; *Cunningham* v. *Macon & B. R. Co.*, 109 U. S. 446 [27:992]; *Hagood* v. *Southern*, 117 U. S. 52 [29:805], and *Ex parte Ayers*, 123 U. S. 443 [31:216]. We do not think it necessary to consider that question anew.
>
> "The other point, the suability of the State, is settled by the decision just rendered in *Hans* v. *Louisiana* [*ante*, 842].
>
> "To the question on which the judges of the circuit court were opposed in opinion, our answer is in the negative, namely, that the suit could not be maintained in the circuit court, against the State of North Carolina by the plaintiff, a citizen thereof."

In *Larson* v. *Domestic and Foreign Commerce Corp., supra*, this Court commented upon the nature of the suit under consideration in the *Temple* case in the following language (337 U. S. at 691, footnote 11):

> "Of course, a suit may fail, as one against the sovereign, even if it is claimed that the officer being sued has acted unconstitutionally or beyond his statutory powers, if the relief requested cannot be granted by merely ordering the cessation of the conduct complained of *but will require affirmative action by the sovereign* or the disposition of unquestionably sov-

ereign property. North Carolina v. Temple, 134 US 22, 33 L ed 849, 10 S Ct 509 (1890)." (Italics supplied)

Under consideration in *Pennoyer* v. *McConnaughy, supra,* was a suit in equity by a citizen of California against certain officials of that State comprising the board of land commissioners to restrain and enjoin them from selling and conveying certain land to which petitioners asserted title. Holding that petitioner was entitled to the limited relief sought, the Court exhaustively reviewed its prior decisions under the Eleventh Admendment and pointed out (140 U. S. at 16-17, 18):

> "The dividing line between the cases to which we have referred and the class of cases in which it has been held that the State is a party defendant, and therefore not suable, by virtue of the inhibition contained in the Eleventh Amendment to the Constitution, was adverted to in *Cunningham* v. *Macon & B. R. Co.*, where it was said, referring to the case of *Davis* v. *Gray, supra: 'Nor was there in that case any affirmative relief* granted by ordering the governor and land commissioner *to perform any act towards perfecting the title of the company.'* 109 U. S. 453, 454 [27:994, 995], thus holding by implication at least, *that affirmative relief would not be granted against a state officer, by ordering him to do and perform acts forbidden by the law of his State, even though such law be unconsitutional.*
>
> "The same distinction was pointed out in *Hagood* v. *Southern*, which was held to be, in effect, a suit against the State, and it was said: 'A broad line of demarcation separates from such cases as the present, in which the decrees require, *by affirmative official action* on the part of the defendants, *the performance of an obligation which belongs to the State in its political*

capacity, those in which actions at law or suits in equity are maintained against defendants who, while claiming to act as officers of the State, violate and invade the personal and property rights of the plaintiffs, under color of authority, unconstitutional and void.'

* * *

"Little remains to be done or said by us in this connection, except to apply the principles announced in the cases we have attempted to review to the facts in the case before us, as set forth in our introductory statement. . . . It must also be observed that the plaintiff *is not seeking any affirmative relief against the State or any of its officers. He is not asking that the State be compelled to issue patents to him* for the land he claims to have purchased, *nor is he seeking to compel the defendants to do and perform any acts in connection with the subject matter of the controversy* requisite to complete his title. All that he asks is, that the defendants may be restrained and enjoined from doing certain acts which he alleges are violative of his contract made with the State when he purchased his lands. He merely asks that an injunction may issue against them to restrain them from acting under a statute of the State alleged to be unconstitutional, which acts will be destructive of his rights and privileges, and will work irreparable damage and mischief to his property rights." (Italics partially supplied)

In *Great Northern Life Insurance Co.* v. *Read*, *supra*, a suit against State officials by a foreign insurance company to recover taxes paid to the State of Oklahoma was held to be within the prohibition of the Eleventh Amendment, and the views expressed in the decisions canvassed above was commented upon in the following language (322 U. S. at 51):

"This ruling that a state could not be controlled by courts in the performance of its political duties through

> suits against its officials has been consistently followed. Chandler v. Dix, 194 US 590, 48 L ed 590, 24 S Ct 766; Fitts v. McGhee, 172 US 516, 529, 43 L ed 535, 541, 19 S Ct 269; Murray v. Wilson Distilling Co., 213 US 151, 167, 53 L ed 742, 750, 29 S Ct 458; Lankford v. Platte Iron Works Co., 235 US 461, 468, et seq., 59 L ed 316, 318, 35 S Ct 173; Re New York, 256 US 490, 500, 65 L ed 1057, 1062, 41 S Ct 588; Worcester County Trust Co. v. Riley, 302 US 292, 296, 299, 82 L ed 268, 273, 275, 58 S Ct 185. Efforts to force, through suits against officials, performance of promises by a state collide directly with the necessity that a sovereign must be free from judicial compulsion in the carrying out of its policies within the limits of the Constitution. Monaco v. Mississippi, 292 US 313, 320, 78 L ed 1282, 1284, 54 S Ct 745; Louisiana v. Jumel, 107 US 711, 720, 27 L ed 448, 451, 2 S Ct 128. . . ."

Finally, the language of the foregoing decisions was recently echoed in the Fourth Circuit by the three-judge District Court for the Eastern District of Virginia (Sobeloff and Haynsworth, Circuit Judges, and Hoffman, District Judge) in the celebrated case of *James* v. *Almond*, 170 F. Supp. 331, *app. dism.* 359 U. S. 1006. Having reviewed a number of the above cited decisions and concluded "that affirmative state action was held to be required in each instance," the Court declared (170 F. Supp. at 341):

> "The test is correctly stated in the recent case of Board of Supervisors of Louisiana State University & Agricultural & Mechanical College v. Ludley, 5 Cir., 252 F. 2d 372, 375, wherein an amendment to the Louisiana State Constitution specified certain state officials as 'special agencies of the State of Louisiana,' and withheld the consent of the State to be sued through any action against such officials. In holding that the suit was not one against the State, the court said:

> "'Full relief can be obtained from the named defendants *without requiring the State to take any affirmative action. This is the test.*'" (Italics supplied)

It is apparent from a mere reading of the amended supplemental complaint and the initial prayer for relief that the instant suit is essentially a suit for a writ of mandamus to compel affirmative action by officials of the State in the performance of an alleged obligation of the Commonwealth of Virginia. Indeed, in paragraph 14 of the amended supplemental complaint, plaintiffs allege that neither the Superintendent of Public Instruction nor the State Board of Education has "acted to discharge the State's constitutional obligation to provide and maintain an efficient system of public free schools" in Prince Edward County. This allegation discloses beyond cavil the fundamental character of the instant litigation.

In addition, as this litigation progressed, the strain of attempting to maintain the masquerade proved too great a burden for the plaintiffs to support. In their motion for further relief, filed after the decision of the Supreme Court of Appeals of Virginia in *Griffin* v. *Board of Supervisors*, 203 Va. 321, 124 S. E. (2d) 227, plaintiffs openly requested the District Court to:

> "(b) Enjoin *the Commonwealth of Virginia* from refusing to provide sufficient funds for the operation of the free public school system in Prince Edward County. . . .
>
> "(c) Enjoin *the Commonwealth of Virginia* . . . from failing and refusing to implement and effectuate in Prince Edward County the provisions of Article IX of the Constitution of Virginia and Title 22, Code of Virginia, 1950, as amended, . . ." (Italics supplied) (R. 126-127).

Although the plaintiff's motion for further relief was subsequently dismissed by the court (R. 87), the above quoted prayers specifically requesting relief against the Commonwealth of Virginia confirm the essential nature of the instant suit.

The device of requesting an order restraining the defendant from "refusing to maintain and operate an efficient system of public free schools" in Prince Edward County, Virginia—instead of an order directing the defendants "to maintain and operate an efficient system of public free schools" in that county—deceives no one and deserves no better fate than that accorded a similar stratagem in the *Jumel* case, *supra*. Similarly, as in the *Jumel* case, granting the requested relief would necessarily entail this Court's assuming the executive authority of the Commonwealth of Virginia so far as it relates to the administration of the Virginia public school laws and the supervision of all persons charged with any official duty in connection with such laws.

Manifestly, this Court cannot require the General Assembly of Virginia to make an appropriation of public funds, nor can it require a fiscal officer of the State (none of whom are parties to this litigation) to pay out public funds which have not been appropriated. Equally clear is it that this Court cannot require officials of the Commonwealth of Virginia affirmatively "to perform official functions on behalf of the State according to the dictates and decrees of the Court" (*Hagood v. Southern supra* at 69), or "to do and perform acts forbidden by the law of his State" (*Pennoyer* v. *McConnaughy, supra* at 16). Yet all of these undertakings are implicit in the relief requested by the plaintiffs and would be required of this Court if such relief were

to be granted. It is obvious, therefore, that a suit requesting such relief is, in its direct purpose and effect, a suit against a State within the prohibition of the Eleventh Amendment to the Constitution of the United States.

III.

The Amended Supplemental Complaint States No Claim Against These Defendants Upon Which Relief Can Be Granted

The Motion to Dismiss filed by the State Board on May 1, 1961, contained as two of its grounds, the following:

> "The Amended Supplemental Complaint fails to state a claim upon which relief can be granted."
>
> "No actual controversy exists between the parties to this suit, nor is there any present clash of contending legal interests between the parties."

The allegations of the Amended Supplemental Complaint made against the State Board are sufficient to give rise to consideration by the Court of only one of the prayers for relief, that being the first.

The first prayer was that the State Board, along with the others, be "enjoined and restrained * * * from refusing to maintain and operate an efficient system of public free schools in Prince Edward County, Virginia."

The motion of State Board was predicated on the belief that under existing State law they cannot do more in Prince Edward County than they are doing, that they have no duty or authority to do more, that they cannot establish schools in the County in the absence of local participation, that they have no funds (except approximately $40,000 annually, referred to as "constitutional funds") which they can send to Prince Edward County, and that they are, therefore, not subject to an injunction which would, in effect, require them

to do that which under State law they cannot do. Since they are performing every duty imposed upon them and exercising all authority vested in them, they have no controversy with the plaintiffs.

Since the District Court reserved judgment on the motion until after the evidence was heard, it is proper to consider the evidence heard by him in judging the correctness of his ruling.

The evidence presented was overwhelmingly to the effect that the State Board has no funds with which it might operate public schools in Prince Edward County without local participation. Indeed, the evidence was not only overwhelmingly, it was exclusively to that effect; so much so that after the plaintiffs had rested their case the District Judge interrupted the defendants' examination of Mr. J. G. Blount, Director, Division of Administration and Finance of the State Board of Education of Virginia, in the following manner:

> "Q. Now, let us take a few of these items as they come, Mr. Blount. Item 355 is for expenses of administration for the State Board of Education.
>
> "MR. DENNY: Would Your Honor care to have the Appropriation Act?
>
> "THE COURT: I do not object to your putting this in, but I, frankly, do not know the purpose of it.
>
> "MR. DENNY: The purpose of it, if Your Honor please, is this: It may or may not be perfectly clear in evidence that it has been alleged, as I understand it, in this amended supplemental complaint, or certainly by implication it seems to me to have been alleged, that there were funds available to the Department of Education which it, itself, might use in Prince Edward County in operating public schools, and that the State

Superintendent of Public Instruction and the State Department of Education have not so done. Now, that seems to me to be alleged in Section 4—

"THE COURT: Well, allegations are not proof. There has not been any proof tendered in support of that allegation, and the evidence so far seems to clearly indicate, and it has not been disputed, that the State Board does not have any funds for that purpose. I don't know what they might put on in rebuttal, but that is the evidence right now, as far as the Court is concerned.

"MR. DENNY: I shall be glad to save some time and abandon this if the plaintiffs will stipulate on the record, so that it may be available to them and this Court and any appellate court, that the State Board of Education and the Superintendent of Public Instruction have not had one penny of moneys with which they could operate public schools in Prince Edward County. If they are ready to stipulate that, I shan't ask this witness another question.

"They are not ready to stipulate it.

"THE COURT: Whether they stipulate it or whether they do not stipulate it does not convince the Court unless they offer proof to that effect. If you want to put it on until they put some proof on that they do have the money, you may do so, and then if they prove it, you will have a chance to rebut it." (See Tr. 478-479)*

As counsel for the defendant (School Board of Prince Edward County) examined Mr. Blount concerning individual items of the Appropriation Act, the Court again indicated the complete absence of evidence that the State Board had funds which it could use in Prince Edward County in the absence of local action:

* All references (Tr.) are to pages in the original transcript.

"THE COURT: I don't want to limit this, but, at the same time, I don't want all the administrators of all the acts to state what they do in every instance. I understood him clearly to say that he did not have any public funds to use for schools in Prince Edward County. Now, is that correct?

"THE WITNESS: Yes, sir.

"THE COURT: Now, I don't know how much more conclusive it could be by his reading all of these acts. Is that going to amplify it any?

"MR. DENNY: I have gone as far as I was going in detail, but I was going to ask him whether his answers would be similar answers to any other items in this appropriation bill under which any moneys were ever paid to county school boards.

"THE WITNESS: The answers would be the same.

"MR. DENNY: If Your Honor please, I said on yesterday I would have two witnesses. My friend, the Attorney General, has called them both, Mr. Wilkerson and Mr. Blount. I have no further evidence.

"THE COURT: No, the Attorney General did not call both of them; he called them jointly with you.

"MR. DENNY: I am always delighted to cooperate with him.

"THE COURT: Well, I am sure you are. Do you have any other questions of this witness?

"Do you have any, Mr. McIlwaine?

"BY MR. MCILWAINE:

"Q. You testified that there is no money available for the operation of public schools in Prince Edward County. By that, you mean operation by the State Board of Education?

"A. That was my intention in answering the question.

"Q. If the Board of Supervisors of Prince Edward County had appropriated funds to the School Board of Prince Edward County and the School Board of Prince Edward County undertook to operate public schools in the county again, then the State Board of Education would have available, would allocate, and would pay to the County School Board its appropriate share of the funds appropriated to the State Board of Education for this addition to the local School Board?

"A. Yes, sir." (See Tr. 487-489)

Woodrow W. Wilkerson, Superintendent of Public Instruction of Virginia had preceded Mr. Blount on the stand. He was called by the plaintiffs and testified, in part, as follows:

"Q. With reference to the disbursement of state funds appropriated for education, what is the function of your department?

"A. The funds are distributed to localities upon their having met certain conditions, and such disbursements are usually made and processed by one of my staff members.

* * *

"Q. So that really what I am trying to say, Mr. Wilkerson, is that the State, through your office or through the Department of Education, does provide funds for public school education in the several localities in the state, does it not?

"A. If the locality meets the conditions for the same.

"Q. Those conditions include standards that are prescribed by the State Board of Education?

"A. They include provisions as are specified in the Appropriation Act." (See Tr. 105 and 106)

Upon conclusion of the defendants' evidence, the plaintiffs had no additional evidence to offer (Tr. 511). Thus, it is clear that the evidence before the District Court was to the effect that these defendants have no funds with which they could comply with an injunction requiring them to refrain "from refusing to maintain and operate" schools in Prince Edward County. The evidence on this point could not have been different. An examination of the Appropriation Act in effect when the case was tried, the Appropriation Act now in effect, and every Appropriation Act as far back as 1918 (counsel have not had an opportunity to gain information as to earlier acts) will reveal that the situation is and has been just as depicted by the testimony. Mr. Blount has been with the State Department of Education for over thirty years (Tr. 466). He testified as follows:

> "Q. Mr. Blount, are there available to the State Board of Education at the present time any funds for the operation of public schools in Prince Edward County by the State Board of Education?
>
> "A. Yes, sir, there are funds available for any public school that is operating in the state.
>
> "Q. Do I understand your answer to the question is, if they are operating in Prince Edward County?
>
> "A. And if they meet the eligibility requirements set forth in the Appropriation Act.
>
> "Q. My question, if I stated it improperly, is this: Are there funds available to the State Board of Education which the State Board of Education may use in operating directly schools in Prince Edward County not under the supervision of the local School Board?
>
> "A. No, sir, there are not.
>
> "Q. To your knowledge, has there ever been an appropriation of any funds, during your tenure with

the State Board of Education, to the State Board of Education for the operation by it of schools in any locality?

"A. No, sir, there has never been any.

"Q. Is there any statutory authority or any regulation of the State Board of Education which authorizes the operation of public schools in any locality by the State Board of Education?

"A. No, sir, I do not know of any.

"Q. And, in all your years with the State Board of Education, has there been any statutory authority or ruling or regulatory authority for the operation of public schools in any locality by the State Board of Education divorced from the supervision of the local County School Board?

"A. Not to my knowledge." (Tr. 469-470)

It appeared from the testimony that not only was there an absence of funds but also an absence of authority in the State Board to operate schools in Prince Edward County. This fact, too, can be determined by an examination of the Constitution and statutes of Virginia.

As we approach such an examination it is important at the outset, to draw a sharp distinction between State Board and the General Assembly. The General Assembly of Virginia, as the legislative branch of the government of a sovereign state, possesses all legislative power not denied to it by the Federal or the State Constitutions. The State Board of Education and the Superintendent of Public Instruction, on the other hand, are created by the Constitution of Virginia. The people of Virginia, speaking through that instrument, have strictly limited their duties and their power.

The State Board of Education is given the following powers and no others, by the Constitution of Virginia:

1. General supervision of the school system. (Constitution of Virginia, Section 130.)

2. The powers and duties spelled out in Section 132 of the Constitution.

"§ 132. The duties and powers of the State Board of Education shall be as follows:

"First. It shall divide the State into appropriate school divisions, comprising not less than one county or city each, but no county or city shall be divided in the formation of such divisions. It shall certify to the local school board or boards of each division in the State a list of persons having reasonable academic and business qualifications for division superintendent of schools, one of whom shall be selected as the superintendent of schools for such division by the said school board or boards, as provided by section one hundred and thirty-three of this Constitution.

"Second. It shall have the management and investment of the school fund under regulations prescribed by law.

"Third. It shall have such authority to make rules and regulations for the management and conduct of the schools as the General Assembly may prescribe; but until otherwise provided by law, the State Board of Education may continue existing rules and regulations in force and amend or change the same.

"Fourth. It shall select textbooks and educational appliances for use in the schools of the State, exercising such discretion as it may see fit in the selection of books suitable for the schools in the cities and counties, respectively; provided, however, the General Assembly may prescribe the time in which the State Board of Education may change the textbooks."

In addition, there is an implied duty under Section 133 of the Constitution for the State Board to prepare a list of approved teachers.

The Superintendent of Public Instruction finds his source of power in Section 131 of the Constitution, which, after creating the office, merely provides that "the powers and duties of the Superintendent of Public Instruction shall be prescribed by law."

It becomes immediately apparent, we submit, that the State Board has neither the constitutional duty nor power to establish and maintain schools in any county or city of the State, for though we import the broadest meaning to every constitutional provision, there simply is no power in the State Board to create such public schools as we are now considering. Mr. Blount's testimony merely establishes the fact that the administrative interpretation is consistent with this finding.

We turn, then, from the Constitution to the statutes to determine whether the Legislature has placed such duty or conferred such power on the State Board. A thorough search has revealed to us no such legislation. To the contrary, certain sections evidence a clear lack of such action by the General Assembly.

Section 22-21 speaks volumes concerning the lack of such power in the State Board. It provides:

> "§ 22-21. The State Board is authorized and required to do all things necessary to stimulate and encourage local supervisory activities and interest in the improvement of the elementary and secondary schools, and, further, the State Board in its discretion may recommend provisions for standards for public and nonpublic kindergarten and nursery schools, provided, however, that no such nonpublic kindergarten or nur-

> sery school shall hold itself out to the public as having been sanctioned or approved by the State Board of Education."

We should note that while the State Board is "authorized and required," it is only authorized and required to "stimulate and encourage"; it is not "authorized to require." If there were authority in the State Board to establish schools or require their establishment, is it not certain that Section 22-21 would have authorized the State Board to require improvements, rather than merely "stimulate and encourage" them?

Even in the matter of compulsory attendance, while the State Board of Education has the authority and duty to see that the laws are enforced, the power is meaningless unless the local authorities first take action to bring the laws into force in their locality.

It is always difficult to cite authority for the absence of a power or duty. We can merely submit that we know of no such duty or power in the State Board and, indeed, throughout the long course of the "Prince Edward case" counsel for the plaintiffs therein have cited no statute imposing such duty upon the State Board.

We conclude, therefore, that there is a complete absence of duty upon or authority in the State Board to establish and maintain schools in a county or city of Virginia.

It was established that the State Board had neither the duty, authority, power nor funds with which to comply with the injunction prayed. It was also established that State funds were available to Prince Edward on the same basis as they were to every other political subdivision in the State. This was demonstrated by the excerpts from testimony of Mr. Blount, previously set forth, and can be further shown in his subsequent examination, as follows:

"Q. Of course, it goes without saying that were public schools being operated in Prince Edward County, it would have the right to share in these funds if it met the conditions applicable to that fund?

"A. That is correct." (Tr. 489).

With these unquestioned facts before it, the District Court should have concluded that the relief prayed could not be granted against the State Board and that, in actuality, there was no controversy. Instead, he overruled the motion, although he, too, concluded that he could not grant the relief prayed for in the Complaint. Instead of granting the relief prayed for, the Court *indicated a course of action which is not sought in any pleading before the Court.* These defendants cannot believe that this Court will give its approval to an injunction against them conditioned upon the performance of acts which they are without duty, power, authority or funds to perform. In such course of action the Court will, under existing Virginia law, make hostages of every public school child in Virginia until the Board of Supervisors of Prince Edward County sees fit to make available funds for the operation of public schools in the county. No court of equity should so condition an injunction. Nor should the Court permit such action by the District Court, out of concern for the welfare of the children of Prince Edward County, and in the hope or casual expectation that the General Assembly of Virginia can and will alter existing law. Whether the General Assembly will, or constitutionally can, alter the existing laws in a manner which would enable the State to operate schools in Prince Edward County without local funds being made available apparently is now settled in the negative by *School Board* v. *Griffin*, 204 Va. 650, 133 S. E. (2d) 565, when the Virginia Court said:

> "If the Constitution makes it the duty of the General Assembly to take over and operate the schools in Prince Edward county, it would have the same duty with respect to all other counties and cities of the State. The result would be a centralization of control and of operation foreign to the spirit as well as the letter of the Constitution, and the destruction of the system adopted in good faith obedience to the requirements of the Constitution and used now for more than sixty years.
>
> "We think it clear that the Constitution as written does not make that requirement."

The Court in *School Board* v. *Griffin, supra*, clearly held also that the State Board cannot reopen the schools in Prince Edward County without action at the local level. When that action is taken, these defendants are ready, willing and able to perform every duty imposed upon them, exercise every power conferred upon them, and release all funds (and funds are available when local action has been taken) available for the purpose, to the end that schools operate in Prince Edward County. Under Virginia law they can do no more; under Federal Court order no more should be required.

IV.

The Amended Supplemental Complaint Seeks Relief Which Can Only Be Granted by a District Court of Three Judges Convened Pursuant to 28 U. S. C. A. 2281.

The plaintiffs in their amended supplemental Bill of Complaint seek to enjoin and restrain all of the defendants, including the State Board of Education and the Superintendent of Public Instruction of Virginia; (a) from refusing to maintain and operate an efficient system of public free schools in Prince Edward County, Virginia; (b) from

expending public funds for the direct support of any private school which, for reason of race, excludes the infant plaintiffs and others similarly situated; (c) from expending public funds in aid of, or in reimbursement of money paid for the attendance of any child at any private school which, for reason of race, excludes the infant plaintiffs and others similarly situated.

The Honorable Judge of the United States District Court for the Eastern District of Virginia found that the closing of the public schools in Prince Edward County is prohibited by the Fourteenth Amendment of the Constitution of the United States and that it was unlawful for the Board of Supervisors of Prince Edward to pay local tuition grants authorized by State statute; and unlawful for the State of Virginia, the State Board of Education, the Superintendent of Public Instruction, the local School Board, or the local Superintendent to accept or process applications for State tuition grants or to pay State tuition grants. In rendering its opinion on the issue of State tuition grants, the Court held that the State statute providing for tuition grants did not authorize said grants to be paid in those Counties where there are no public schools operated. The District Court rendering this decision interpreted the State statute, although no State Court has ever construed the statute and although there was no evidence introduced to support this holding.

The Court enjoined the Board of Supervisors from paying local scholarship grants and enjoined the local School Board, local Division Superintendent, State Board of Education and State Superintendent of Public Instruction from receiving and processing applications, and from paying State tuition grants to residents of Prince Edward County. The District Court also "adjudged, ordered and decreed that the Public Schools of Prince Edward County,

may not be closed to avoid the effect of the law of the land as interpreted by the Supreme Court while the Commonwealth of Virginia permits other public schools to remain open at the expense of the taxpayer." In view of the holding of the Supreme Court of Appeals of Virginia that there is no duty or obligation upon the Board of Supervisors of Prince Edward County to make any appropriation for public schools, *Griffin* v. *Board of Supervisors of Prince Edward County*, 203 Va. 321, 124 S. E. 2d 227, the effect of the adjudication of the District Court, if implemented, would be to enjoin the State of Virginia, its officers, agents and employees from contributing financial support to and to enjoin the operation of public schools anywhere in the State of Virginia. Surely, in the record of American judicial annals no more drastic holding affecting the legislative enactments of a State Government has ever been rendered by any single United States District Judge.

Section 2281 of Title 28 of the United States Code provides:

> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of any order made by an administrative board of commission acting under State statutes, shall not be granted by any District Court or Judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a District Court of three judges under Section 2284 of this title."

In the case of *Frasier* v. *Board of Trustees of University of North Carolina*, 134 F. Supp. 589, a three-judge court

composed of Judge Soper, Circuit Judge, Judge Dobie, Circuit Judge, and Judge Hayes, District Judge, in an opinion of Judge Soper, held:

"Suit seeks declaratory judgment that certain orders of Board of Trustees of Consolidated University of North Carolina, which deny admission to the undergraduate schools of the institutions to members of the negro race, are in violation of the equal protection clause of the Fourteenth Amendment of the Constitution of the United States. The plaintiffs also ask for an injunction restraining the university and its trustees and officers from denying admission to the undergraduate schools to negroes solely because of their race and color. The plaintiffs pray for relief under Rule 23(a) * * * as a class who passes the qualifications for entrance to the university * * *. The defendants contend that the case is not one for a three judge court because there is no constitutional or statutory provision which denies the admission of Negroes to the university or required the segregation of persons admitted to the university on account of their color.

"We hold, however, that jurisdiction exists in the Court, as now set up, because the statute 28 USCA Sec. 2281, requires a three judge court not only when it is sought to restrain the enforcement of an unconstitutional statute, but also the enforcement of an unconstitutional order of an administrative board or commission, clothed with authority and acting under the laws of the State. The jurisdiction of a three judge court was sustained under circumstances precisely similar to those in the case at bar in *Wilson* vs. *Board of Supervisors*, D.C. Ala. 92 F. Supp. 986, which was affirmed without opinion in 340 US 909, 71 S.Ct. 294, 95 L.Ed. 657, and 340 US 939, 71 S.Ct. 490, 95 L.Ed. 678. The decision was based on the ground that a three judge court is required when an injunction is sought because of the unconstitutionality of the order of a

State administrative board. It is beyond dispute that the State of North Carolina, both of constitution and by statute, has clothed the Board of Trustees of the University with authority to make such rules and regulations for the management of the institution as they deem necessary and expedient, and it follows that the regulations now under attack, must be considered a 'statute' to which the State has given its sanction within the meaning of the jurisdictional provisions of 28 USC Sec. 2281. See *American Federation of Labor* vs. *Watson*, 327 US 582, 592, 66 S.Ct. 761, 90 L.Ed. 873, *Oklahoma Natural Gas Co.* vs. *Russell*, 261 US 290, 43 S.Ct. 353, 67 L.Ed. 659. In *McCormick & Co.* vs. *Brown*, 4 Cir. 52 F. 2d 934, 937, it was said: '* * * it is settled that a Court of three judges is required not only when the constitutionality of the State statute is involved, but also when the constitutionality of an order of a State administrative board or commission purporting to be authorized by State statute, is drawn into questions.' See also *Suncrest Lumber Co.* vs. *North Carolina Park Comm.*, 4 CCA, 29 F. 2d 823, appeal dismissed without consideration, 280 US 615, 50 S.Ct. 13, 74 L.Ed. 656." 134 F. Supp. at 590, 591, 592; Affirmed, per curiam, 350 US 979, 100 L.Ed. 848, 76 S.Ct. 467.

In an earlier case, *Suncrest Lumber Co.* v. *North Carolina Park Commission*, 29 F. 2d 823 (4th CCA—Nov. 27, 1929), the Court, in an opinion by the late Judge Parker, held:

"At the threshold of the case we are confronted with the question of jurisdiction. There can be no question that complainant sought an interlocutory injunction to restrain the enforcement and execution of a statute of the State of North Carolina on the ground that the statute was unconstitutional. If, therefore, the persons sought to be restrained by the injunction are officers of

the State, there can be no doubt that the case falls squarely within the provisions of Section 266 of the Judicial Code (28 USCA Sec. 380), which requires a Court of three judges, and hence that the Judge before was without jurisdiction to enter the order complained of. * * *

"And we think there can be no doubt that defendants are officers of the State within the ordinary meaning of these words and within the meaning intended by Section 266 of the Judicial Code. It is true that the North Carolina Park Commission is created a body 'politic and corporate'; but it is created such not as an ordinary corporation but as an agency of the State of North Carolina, to exercise sovereign powers in behalf of the State and in its name. * * *.

"And when we consider the reason and spirit of the statute, which has been incorporated in the Judicial Code as Section 266, we think that defendants are clearly officers of the State within its meaning. That statute was enacted because it was thought unseemly that one District Judge should stop the officers of a State in the enforcement of its laws, and thereby, in effect, set aside the deliberate act of its legislature. The defendants here have been expressly designated by the Legislature to carry out the park project upon which the State has embarked in cooperation with the State of Tennessee and the National Government. They represent not a county or locality, as in the Henrietta Mills case, supra, but the State itself, and an injunction restraining them would, in effect, restrain the action of the State and would set aside the action of the State Legislature.

"For these reasons the learned District Judge was without power to pass upon the applications for interlocutory injunction without calling to his assistance two other judges, as required by Section 266 of the Judicial Code, and his attempted action is void. Ex-parte Metropolitan Water Co., 220 US 539, 31 S.Ct.

> 600, 55 L.Ed. 575. We cannot pass upon the matter here because the appeal from the Court of Three Judges is not to this Court but to the Supreme Court. The order appealed from will be set aside, therefore, and the case will be remanded to the District Court for further proceedings not inconsistent with this opinion, order set aside, cause remanded." 29 F.2d at 823, 824.

The basic factual circumstances in each of the above referred to cases were similar to those in the case now before this Court. One or more persons were seeking to enjoin and restrain State Boards or Commissions from performing their duties pursuant to State laws. In the instant case, State and local officers and the State Board of Education are enjoined from paying tuition grants under State law and are told they will be enjoined and restrained from permitting public schools over the entire State of Virginia from being operated as authorized by State law and State constitution.

This Court held in the case arising out of the declaring of martial law by the Governor of Texas in the oil fields of Texas when the State sought to limit production of oil:

> "Nor does the fact that it may appear that the State officer in such case, while acting under color of State law, has exceeded the authority conferred by statute, deprived the Court of jurisdiction. * * * As the validity of provisions of the State constitution and statutes, if they could be deemed to authorize the action of the Governor, was challenged, the application for injunction was properly heard by three judges. Stratton vs. St. Louis Southwestern R. Co. 282, US 10, 51 S.Ct. 8, 75 L.Ed. 135. The Jurisdiction of the District Court so constituted and of this Court upon appeal, extends to every question involved, whether of State or Federal law, and enables the Court to rest its judgment on the

decision of such of the questions as in its opinion effectively dispose of the case." *Sterling, Governor of Texas* vs. *Constantin* and *Constantin* vs. *Smith*, 287 US 378.

Your defendants are not unmindful of the opinion of the three judge court as originally convened before whom the original Prince Edward suit was tried. That opinion held, after the *Brown Decision*, 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873; Id., 349 U. S. 294, 75 S. Ct. 753, 99 L. Ed. 1083, as follows:

"Argument has been had on the suggestion from the Court that the participation of three judges is no longer necessary and that the Judges other than the Judge before whom the case was originally brought should retire therefrom, since the questions of the validity of the State constitutional and statutory provisions have been settled, these provisions have been declared invalid and all that remains in the case is the enforcement of constitutional rights without reference to any State constitutional or statutory provisions. We think it clear that this course should be taken. * * * It is perfectly clear in this case that with the unconstitutionality of the Virginia statute and constitutional provision definitely adjudicated, the questions raised by the subsequent motion are not within the statutory purpose for which the two additional judges had been called. In such situation, the three judge court should be dissolved and the two additional judges should retire from the case. *Bush* vs. *Orleans Parish School Board*, D. C. 138 F. Supp. 336, mandamus denied by the Supreme Court 76 S. Ct. 854; *Kelly* vs. *Board of Education*, D. C. 139 F. Supp. 578; *Booker* vs. *State of Tennessee Board of Education*, 76 S.Ct. 856. In the cases cited, three judge courts which had been constituted to hear school segregation cases were dissolved on the ground

> that no substantial question as to the constitutionality of the State statute remained after the decision of the Supreme Court holding statutes requiring segregation to be unconstitutional and invalid; and the Supreme Court denied application to leave to file petitions for writs of mandamus requiring that they be heard before three judge courts." *Davis* vs. *County School Board of Prince Edward County* (D.C. E.D. Va.), 142 F. Supp. 616 at 617, 619.

It is respectfully submitted that the three judge court in the above opinion of the late Chief Judge Parker was referring to the State statutes and constitutional provisions requiring segregation in the public schools of Virginia. In the present case entirely different statutes and constitutional provisions of the State of Virginia are involved. The entire school code, and appropriations act of the State are directly involved in this litigation and the questions presented in this case as to whether or not said provisions of State law and the actions of State and local boards and officers acting pursuant thereto are repugnant to the Fourteenth Amendment of the United States Constitution have never been presented to, much less decided by, any State or Federal Court prior to the filing of the Supplemental Bill of Complaint in this case. Therefore, the District Court acting through a single district judge had no jurisdiction to pass upon this case on its merits and this Honorable Court has no jurisdiction since 28 U.S.C.A. Sec. 2281 and 28 U.S.C.A. Sec. 1253 requires a three judge district court with direct appeal to the Supreme Court of the United States. See *Query* v. *United States*, 316 U. S. 486, where it was held:

> "Here a substantial charge has been made that a State statute as applied to the complainants violates the Con-

stitution. Under such circumstances we have held that relief in the form of an injunction can be afforded only by a three judge court pursuant to Sec. 266 (now Sec. 2281) * * *. Since there was such complete satisfaction of the conditions which make Section 266 applicable, the cause was a proper one for a three judge court and appeal did not lie to the Circuit Court of Appeals." 316 U. S. at 490.

One of the most complete and frequently cited decisions on procedural issues of the special three judge court is that of *Stratton* v. *St. Louis South Western R. Co.*, 282 U. S. 10, where in a decision by Chief Justice Hughes, the Court unanimously held:

"If an application for an interlocutory injunction is made and pressed to restraining the enforcement of the State statute of an administrative order made pursuant to a State statute upon the ground that such enforcement would be in violation of the Federal Constitution, a single Judge has no jurisdiction to entertain a motion to dismiss the bill on the merits. He is as much without power to dismiss the bill on the merits as he would be to grant either an interlocutory or a permanent injunction. * * *

"If a single judge, thus acting without jurisdiction, undertakes to enter an order granting a interlocutory injunction on a final decree, either dismissing the bill on the merits or granting a permanent injunction, no appeal lies from such an order or decree to this court, as the statute plainly contemplates such a direct appeal only in the case of an order or decree entered by a court composed of three judges in accordance with the statutory requirement. Nor does an appeal lie to the Circuit Court of Appeals from an order or decree thus entered by a District Judge without authority, for to sustain a review upon such an appeal would defeat

the purpose of the statute by substituting a decree of a single judge and an appeal to the Circuit Court of Appeals for a decree by three judges and a direct appeal to this court. * * *

"It follows that in the present case, no appeal lay to the Circuit Court of Appeals, and that court should have dismissed the appeal for want of jurisdiction. * * *

"The requirement of the statute has regard to substance and not to form. It matters not whether the injunction is called preliminary or interlocutory, or is styled a temporary restraining order, if it is granted to restrain the enforcement of State legislation * * * as the proceeding in this suit fell within the provisions of the statute and the District Judge had no jurisdiction to hear the motion to dismiss the bill on the merits, the consent of the parties could not give validity to the decree or confer jurisdiction upon the Circuit Court of Appeals to entertain an appeal therefrom. * * *

"The remedy by mandamus to vacate the decree and to require the District Judge to call to his assistance two other Judges, as directed by the statute, to hear the application for an interlocutory injunction, is still available. It is not necessary, however, that formal application should be made for such a writ, as the District Judge may now proceed to take the action which the writ, if issued, would require.

"When it appears, on the appeal to this court from a decree of the Circuit Court of Appeals, that the latter Court has acted without jurisdiction in entertaining the appeal from the District Court, the appropriate action of this Court is to reverse the decree of the Circuit Court of Appeals and to remand the case with directions to dismiss the appeal to that Court for want of jurisdiction." 282 U. S. at 15, 16, 17, 18; 75 L. Ed. at 138, 139, 140.

The most recent detailed holding and opinion on this subject by this Court is that in the decision of the Court writ-

ten by Mr. Justice Whittaker in the case of *Florida Lime and Avocado Growers* v. *Jacobsen*, 362 U. S. 73. The lime and avocado growers, engaged in the business of growing, packing, and marketing in commerce, Florida Avocados, brought the action in the District Court of California to enjoin the state officers of California from enforcing a provision of the California Agricultural Code. The Growers alleged that the action of the California State officials in barring shipments of Florida grown avocados into California was in violation of the Commerce and Equal Protection clauses of the United States Constitution as well as of the Federal Agricultural Marketing Agreement Act of 1937, and Florida Avocado Order No. 69 issued thereunder.

The growers requested a three judge District Court pursuant to 28 U.S.C. Sec. 2281 to hear the case. After hearing, the District Court, concluded that because appellants had not contested the validity of the California statute nor sought abatement of the state officers condemnation of the avocados in the California State Courts the case presented "no more than a mere prospect interference posed by the bare existence of the law in question," and that it had "no authority to take jurisdiction and was left with no course other than to dismiss the action," which it did. 169 F. Supp. 774, 776.

The case was appealed to the Supreme Court of the United States on direct appeal under 28 U.S.C. Sec. 1253. This Court held:

> "Section 2281 seems rather plainly to indicate a congressional intention to require an application for an injunction to be heard and determined by a court of three judges in any case in which the injunction may be granted on grounds of Federal unconstitutionality. * * * Section 2281 * * * seems clearly to require that

when, in any action to enjoin enforcement of a State statute, the injunctive decree *may issue* (italics supplied) on the ground of Federal unconstitutionality of the State statute, the convening of a three-judge court is necessary; and the joining in the complaint of a non-constitutional attack along with the constitutional one does not dispense with the necessity to convene such a Court. To hold to the contrary would be to permit *one* federal district judge to enjoin enforcement of a State statute on the ground of Federal unconstitutionality whenever a non-constitutional ground of attack was also alleged, and this might well defeat the purpose of Sec. 2281. * * *

"Indeed, the cases since 1925 have continued to maintain the view that if the constitutional claim against the State statute is substantial, a three judge court is required to be convened and has jurisdiction as do we on direct appeal, over *all* grounds of attack against the statute.

* * *

"To hold that only one judge may hear and decide an action to enjoin the enforcement of a State statute on both constitutional and non-constitutional grounds would be to ignore the explicit language and manifest purpose of Sec. 2281, which is to provide for a three judge court wherever an injunction sought against a State statute may be granted on Federal constitutional grounds. Where a complainant seeks to enjoin a State statute on substantial grounds of Federal unconstitutionality then even though non-constitutional grounds of attack are also alleged, we think the case is one that is required by . . . Act of Congress to be heard and determined by a District Court of *three* judges. 28 USC S 1253." 362 U.S. at 76, 77, 80, 84, 85.

The plaintiffs in the amended Supplemental Complaint requested the District Court to enjoin and restrain the de-

fendants from conveying, leasing, or transferring title to certain school buildings, pursuant to Secs. 22-161.1 through 22-161.5 of the Code of Virginia. The plaintiffs did not question the authority of the defendants to make such transfers or conveyances under the State statutes cited above but stated that said transfers and conveyances would violate the rights of the plaintiffs guaranteed under the Due Process and Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

The plaintiffs also alleged in the Amended Supplemental Complaint that the action of the defendants, acting under State statutes, refusing to operate and maintain public free schools in Prince Edward County violated Section 129 of the Constitution of Virginia and violated the Due Process and Equal Protection Clauses of the Constitution of the United States.

With these allegations and prayers in the Amended Supplemental Complaint, the District Judge was required to have a three judge court appointed to hear the case. The suit was one to enjoin the enforcement of one or more State statutes, and on the issues present, the plaintiffs requested an "injunctive decree (which) may issue on the grounds of Federal unconstitutionality of the State statute." Therefore, "the convening of a three judge court is necessary and the joining in the complaint of a nonconstitutional attack along with the constitutional one does not dispense with the necessity to convene such a court." *Florida Lime and Avocado Growers* v. *Jacobsen, supra;* 362 U. S. at p. 80.

In the Amended Supplemental Complaint, the plaintiffs in addition to the above alleged ground for injunctive relief against the defendants which were also contained in the supplemental complaint added additional ones seeking to enjoin the payment of state and local scholarship grants as

clearly authorized by state statutes. The only grounds alleged in the attack on the action of the defendants in regard to scholarship payments were that said actions as authorized by State statutes, violated the Due Process and Equal Protection Clauses of the Constitution of the United States. Clearly a three judge court was required and should have been appointed. The single District Judge had no jurisdiction to continue to hear the case on its merits and this Honorable Court has no jurisdiction to hear the appeal on its merits. The only thing this Honorable Court can do is to dismiss the appeal and send the case back to the District Court with an order that a three judge court be convened.

V.

State Scholarships Are Available Under Section 22-115.29 et seq. of the Virginia Code to Persons Residing in Prince Edward County While the Public Schools of Such County Are Closed.

In their amended supplemental complaint, plaintiffs requested the District Court to enjoin the State Board, the local school board and the local board of supervisors from expending public funds "for the direct or indirect support of any private school which, for reason of race, excludes the infant plaintiffs and others similarly situated" or in aid of the attendance of any child at such a school (R. 27-28). The District Court did not grant this relief, but it did enjoin the State Board from processing or approving applications for State scholarship grants from persons residing in Prince Edward County so long as the public schools of that county remained closed (R. 65, 67, 87). This wholly unrequested relief was predicated upon the District Court's construction of the State scholarship law, Section 22-115.29 of the Virginia Code, to exclude from eligibility children residing in localities in which public schools are not operated.

Counsel for the State Board submit that the District Court was utterly without authority to enjoin the statute in question upon the stated ground. No citation of authority is required to establish the proposition that a suit instituted by residents of Prince Edward County, Virginia, to enjoin State officials from expending funds upon the ground that such expenditures were not authorized by State law would lack both diversity of citizenship and a "Federal question," one of which is indispensable to the jurisdiction of a Federal court. Similarly, administration of a State statute which is not found to violate either the Constitution or laws of the United States may not be enjoined by a Federal court upon the ground that such administrative action is not authorized by the statute in question.

In attempting a wholly gratuitous interpretation of the State scholarship law, the District Court fell into error so obvious as to be evident from a mere reading of the statute which the District Court purported to construe. Analysis of that statute furnishes irrefutable intrinsic support for the view that the State scholarships therein established are available for the education of every child of school age residing in a political subdivision of the Commonwealth of Virginia regardless of whether or not public schools are operated in a particular locality. Indeed, in its authoritative interpretation of the statute in question in *School Board* v. *Griffin*, 204 Va. 650, 133 S. E. (2d) 565, the Supreme Court of Appeals of Virginia conclusively declared (204 Va. at 668, 669):

> "As noted above, the trial court decided that the payment of State scholarship grants to the parents of children residing in Prince Edward county is not conditioned upon the operation of public free schools in

> the county and that such scholarships are available under §§ 22-115.29 *ff.* of the Code even though the public schools in the county are closed.
>
> * * *
>
> "We perceive nothing *in or out of* the statutes to render these scholarships unavailable to any eligible child in Prince Edward county whether public free schools are operated in the county or not." (Italics supplied)

In light of the foregoing, it is clear that State scholarships provided by Section 22-115.29 *et seq.* of the Virginia Code are available to parents of children of school age residing in Prince Edward County, whether public schools are operated in that county or not.

VI.

The Public Schools of Prince Edward County May Be Closed to Avoid Their Operation On a Racially Integrated Basis While Public Schools Remain Open in Other Localities of Virginia.

In Argument III of this brief, it has been demonstrated that the State Board has no duty or authority to reopen and operate schools in Prince Edward County under the Constitution and statutes of Virginia. The law and the evidence which establish that fact clearly reveal that the State has a truly local option system in which State funds are made available in a number of categories on a basis of local matching. It is significant that under that system practically every political subdivision elects not to participate in some one or more of the funds available. Prince Edward County has elected not to participate in any.

It is our purpose here to show that the Supreme Court of Appeals of Virginia has recognized the local option structure of the public school system in the Commonwealth and

to demonstrate that such system does not violate the Fourteenth Amendment.

Recognition by the Virginia Supreme Court of the local option character of the Virginia public school system is easily and conclusively evidenced by the recent decisions of that Court in the celebrated cases of *Griffin* v. *Board of Supervisors*, 203 Va. 321, 124 S. E. (2d) 227 and *Harrison* v. *Day*, 200 Va. 439, 106 S. E. (2d) 636. In the former case, the Court held that Section 136 of the Virginia Constitution vested in "the local authorities" the exclusive power to determine what sums—if any—should be raised by local taxation for the operation of public schools in a locality, that this exclusive power could not be "taken away" by the General Assembly and that its exercise could not be compelled by writ of mandamus. *Id.* at 326, 329. In the latter case, the Court invalidated a series of enactments of the General Assembly of Virginia upon the ground that the statutes in question were violative of Sections 133 and 136 of the Virginia Constitution which vested supervision of the local schools and expenditures of local school taxes in the local school boards. Specifically, the Court declared (200 Va. at 452):

> "Again, the Act of 1956, Ex. Sess., ch. 68, p. 69 (Code, 1958 Cum. Supp., §22-188.30 *ff.*), providing for the closing of schools because of integration, divesting local authorities of all power and control over them, and vesting such authority in the Governor, violates Section 133 of the Constitution which vests the supervision of local schools in the local school boards. *School Board* v. *Shockley*, *supra*, 160 Va., at page 409.
>
> "Similarly, the Act of 1956, Ex. Sess., ch. 69, p. 72 (Code, 1958 Cum. Supp., §22-188.30 *ff.*), providing for the establishment and operation of a State school

system to be administered by the Governor and under the supervision of the State Board of Education, violates Section 133.

"Section 11 of this Act (Code, 1958 Cum. Supp., §22-188.40) directs that local levies authorized under the Act be paid into the State treasury to be expended by the State Board of Education in such localities. This runs counter to Section 136 of the Constitution which requires that local school taxes be expended by the 'local school authorities.'

"The Act of 1958, ch. 41, p. 26 (Code, 1958 Cum. Supp., §22-188.41 *ff.*), and the Act of 1958, ch. 319, p. 367 (Code, 1958 Cum. Supp., §22-188.46 *ff.*), provide for the closing of schools in communities which may be disturbed because of the presence in, and policing of, such schools by federal troops and personnel. Under the provisions of these chapters such schools are automatically closed. When a school is closed under these provisions all authority over it is taken from the local school authorities and vested in the Governor. (Code, 1958 Cum. Supp., §§ 22-188.43, 22-188.44, 22-188.47, 22-188.48.) While we agree that the State, under its police power, has the right under these conditions to direct the temporary closing of a school, the provision divesting the local authorities of their control and vesting such authority in the Governor runs counter to Section 133 of the Constitution."

Consistent with the views expressed in the above-canvassed decisions is that enunciated by the Supreme Court of Appeals of Virginia in the recent case of *School Board* v. *Griffin*, 204 Va. 650, 668, 133 S. E. (2d) 565, in the following language:

"The Debates of the Constitutional Convention on the report of the Committee on Education and Public Instruction, from which came the present constitu-

> tional provisions, indicate that the method adopted by the General Assembly is in keeping with the requirements of Article IX. In the course of the debate an amendment was offered which would have required the State constitutional funds to be used to maintain primary schools for at least four months in each year. The proposed amendment did not find support and was withdrawn. Debates Constitutional Convention 1901-1902, vol. 1, pp. 1213-1218, 1229-1231. In the entire debate on the report no member made the direct proposal that the operation of the schools be placed in other than local hands. The proceedings indicate a purpose to leave the State only with the duty of establishing a system which would *enlist the support of the localities and leave to them the determination of the number and character of the schools they were willing to operate.* A member of the committee expressed it to be his understanding that 'the report of this committee has as its *underlying principle* and its basis *local self-government and home rule.' 'The discretion as to whether any or all schools are established is first vested in the local trustees,* * * *' (Debates, pp. 1227-8)." (Italics supplied)

In light of these decisions, it is clear that the local option feature of the Virginia public school system is—and for more than half a century has been—woven into the organic law of the State.

At this point it should be emphasized that the Fourteenth Amendment does not require any State to operate public schools or provide any form of free public education. Supportive of this fundamental proposition are three recent decisions of Federal courts in Virginia. In the celebrated case of *James* v. *Almond*, 170 F. Supp. 331, the three-judge District Court (Sobeloff and Haynsworth, Circuit Judges, and Hoffman, District Judge) flatly declared (170 F. Supp. at 337):

> "We do not suggest that, aside from the Constitution of Virginia, the State must maintain a public school system. *That is a matter for State determination.*" (Italics supplied)

Subsequently, in *Allen* v. *County School Board of Prince Edward County*, Civil Action No. 1333, the Court (Lewis, J.) dismissed a motion of the United States to intervene as a party plaintiff and, during the course of its opinion, proclaimed (unreported opinion at page 21):

> *"This Court knows of no provision of the United States Constitution which provides that the states shall provide a system of free public education and none has been cited."* (Italics supplied)

Finally, in the instant case, the United States Court of Appeals for the Fourth Circuit pointed out (322 F. (2d) at 336):

> "On the principal issue, the question whether the plaintiffs have a judicially enforceable right to have free public schools operated in Prince Edward County, the plaintiffs contend that the closure of the schools, taken either alone or in conjunction with the subsequent formation of the Prince Edward School Foundation and its operation of private schools for white pupils only, was the kind of 'evasive scheme' for the perpetuation of segregation in publicly operated schools which was condemned in Cooper v. Aaron, 358 U.S. 1. The United States, as *amicus curiae* advances a different principle, contending that there is a denial of the Fourteenth Amendment's guarantee of equal protection of the laws when the Commonwealth of Virginia suffers the schools of Prince Edward County to remain closed, while schools elsewhere in the state are operated.

"As to the plaintiffs' contention, *it may be summarily dismissed in so far as it is viewed as a contention that the Fourteenth Amendment requires every state and every school district in every state to operate free public schools in which pupils of all races shall receive instruction.* The negative application of the Fourteenth Amendment is too well settled for argument. It prohibits discrimination by a state, or one of its subdivisions, against a pupil because of his race, but *there is nothing in the Fourteenth Amendment which requires a state, or any of its political subdivisions with freedom to decide for itself, to provide schooling for any of its citizens.* Schools that are operated must be made available to all citizens without regard to race, *but what public schools a state provides is not the subject of constitutional command.*" (Italics supplied)

In light of the above quoted decisions, it is manifest that the Commonwealth of Virginia is under no obligation imposed by the Constitution of the United States to operate public schools.

Being under no such obligation, the people of Virginia, by provision in the organic law of the State, have reserved to the various localities of the State *exclusively* the determination of whether or not public schools shall be established and operated in any particular locality.

Local option provisions of State laws present no question of conflict with the Fourteenth Amendment. The most recent pronouncement of this Court upon this point appears to be contained in *Salsburg* v. *Maryland*, 346 U. S. 545, in which case the Court sustained a Maryland statute authorizing the admission of illegally obtained evidence in certain prosecutions in Anne Arundel County while prohibiting the admission of such evidence in similar prosecutions in other counties of the State. Rejecting the contention that

the statute under consideration was violative of the Fourteenth Amendment, the Court declared (346 U. S. at 552):

> "*There seems to be no doubt that Maryland could validly grant home rule to each of its 23 counties and to the City of Baltimore to determine this rule of evidence by local option.* It is equally clear, although less usual, that a state legislature may itself determine such an issue for each of its local subdivisions, having in mind the needs and desires of each. *Territorial uniformity is not a constitutional requisite.*" (Italics supplied)

In *Ohio ex rel. Lloyd* v. *Dollison*, 194 U. S. 445, this Court had occasion to consider the constitutional validity of the Beal Local Option Law of Ohio. Affirming a judgment of conviction for violation of this enactment, the Court observed (194 U. S. at 448-449):

> "Plaintiff in error further urges that to make an act a crime in certain territory and permit it outside of such territory is to deny to the citizens of the state the equal operation of the criminal laws; and this he charges against, and makes a ground of objection to, the Ohio statute. *This objection goes to the power of the state to pass a local option law; which, we think, is not an open question.* The power of the state over the liquor traffic we have had occasion very recently to decide. We said, affirming prior cases, the sale of liquor by retail may be absolutely prohibited by a state. *Cronin* v. *Adams*, 192 U. S. 108, *ante*, 365, 24 Sup. Ct. Rep. 219. That being so, the power to prohibit it conditionally was asserted, and the local option law of the state of Texas was sustained." (Italics supplied)

See, also, *Rippey* v. *Texas*, 193 U. S. 504; *Ft. Smith Light and Traction Co.* v. *Board of Improvement*, 274 U. S. 387.

Numerous examples of local option provisions of Virginia law similar to that embraced in the Virginia school laws exist. Sections 16.1-201 and 16.1-202 of the Virginia Code provide for the establishment of local juvenile detention facilities. No county or city is required to construct a detention home; however, if a locality elects to establish such an institution, the State will provide funds to aid in the cost of construction and will participate in furnishing and equipping the structure as well as paying the salaries of operational personnel.

Section 32-292 *et seq* of the Virginia Code makes provision for a State-local hospitalization program. There is no requirement that any county or city operate such a program; however, if a locality elects to do so, the State will reimburse one-half of the cost of such hospitalization within the limits of an appropriation made by the Legislature for that purpose. Localities which have not elected to inaugurate such a hospitalization program appropriate no money for such purpose and receive no State aid. Surely, no one can suggest that if the governing body of Prince Edward County exercised its local option by declining to establish a juvenile detention facility or to inaugurate a hospitalization program any rights guaranteed citizens of Prince Edward County by the Fourteenth Amendment would be infringed by the State's continuing to furnish funds to other localities which might elect to undertake such programs.

Continuing the citation of examples of local option provisions similar to those existing under State law, the Court of Appeals for the Fourth Circuit in the case at bar observed (322 F. (2d) at 342):

> "Federal analogies readily come to mind. The United States makes available to participating states which

> enact prescribed legislation, grants for unemployment, compensation administration. Under the National Defense Education Act, federal funds are made available to localities conducting in their schools approved programs of science, mathematics and foreign languages. *It is suggested that there is no geographic discrimination in the provision for such optional grants, though a state or locality may exercise its option not to participate.*
>
> "*Such local-option provisions as those the defendants think analogous are constitutionally unassailable.* When a state undertakes to encourage local conduct of educational or social programs by making matching funds available to participating localities, *there is no discrimination against nonparticipating localities. Since every locality may participate if it wishes to do so, and the state funds are available to each upon the same conditions, the state is evenhanded.*" (Italics supplied)

Clearly, the historic "local option" feature of the Virginia public school laws infringes no rights guaranteed citizens of any locality by the Fourteenth Amendment. Equally certain is that if a locality exercises its option by declining to operate public schools rather than operate such schools on a racially integrated basis, no constitutional right of the citizens of that locality are violated. A series of recent decisions combines to establish the validity of this position beyond dispute. *Tonkins* v. *City of Greensboro*, 162 F. Supp. 549, *aff'd. per curiam* 4 Cir., 276 F. (2d) 890; *Gilmore* v. *City of Montgomery*, 176 F. Supp. 776, *aff'd.* 5 Cir., 277 F. (2d) 364; *Clark* v. *Flory*, 141 F. Supp. 248, *aff'd. per curiam* 4 Cir., 237 F. (2d) 597; *Willie* v. *Harris County*, 202 F. Supp. 549; *Hampton* v. *City of Jacksonville*, 304 F. (2d) 319; *Hampton* v. *City of Jacksonville*, 304 F. (2d) 320, *cf. Simkins* v. *City of Greensboro*, 246 F. (2d) 425; *Shuttlesworth* v. *Gaylord*, 202 F. Supp. 62.

In *Tonkins* v. *City of Greensboro, supra,* Negro citizens of the city of Greensboro instituted suit (1) to enjoin the city from operating a city-owned swimming pool on a racially segregated basis and (2) to enjoin the city from selling the pool in question solely to avoid having to operate it in such fashion. In its opinion the District Court stated the question presented by the request for an injunction forbidding the contemplated sale, and the law applicable to that question, in language sufficiently significant to merit extended quotation in this brief (162 F. Supp. at 555-557):

> *"Whether defendants may sell Lindley Park Swimming Pool for the sole purpose of avoiding the duty imposed upon them to permit use of the pool by both Negro and white residents of Greensboro under like terms and conditions, and for the sole purpose of defeating the constitutional rights of plaintiffs, and others similarly situated, to use the swimming pool under the same terms and conditions applicable to white citizens.*
>
> * * *
>
> "The plaintiffs allege and contend that the facts, when viewed realistically, conclusively show that the City of Greensboro resolved to close its swimming pools and undertake their sale for the sole purpose of avoiding their duty to operate the pools on a racially integrated basis, and for the sole purpose of defeating the rights of plaintiffs to use the Lindley Park Swimming Pool under the same terms and conditions applicable to white persons. The defendants on the other hand contend that the facts simply show that the City Council, recognizing that if it continued to operate public swimming facilities it must operate them on a racially integrated basis, and being of the opinion that racial integration of such facilities would disrupt the existing harmonious relationship existing between the two races, and would seriously impair the usefulness and economic value of these properties, and might lead to pub-

lic disorder, decided that it was in the best public interest to close and sell these facilities at public auction and use the proceeds for other recreational uses and purposes which would be of more benefit to a greater number of its citizens.

* * *

"The question here presented is whether the defendants have the right to close or sell the Lindley Park Swimming Pool rather than to operate it on an integrated basis. The plaintiffs contend that the answer to this question depends upon whether there is a duty imposed upon the defendants to support the Fourteenth Amendment to the Constitution of the United States. There is no question but that the defendants do have a positive duty to support the Fourteenth Amendment and other provisions of the Constitution of the United States, as these provisions are interpreted by our courts, but the question still remains as to whether or not the Constitution of the United States imposes upon a municipality the positive duty to own and operate recreational facilities.

"The plaintiffs concede that this is the first case in which the right of a state or municipality to close or sell public facilities has been challenged as violative of the Constitution of the United States. Under these circumstances, they are unable to cite any authority in direct support of their position. They seek to establish as a legal theory the proposition that there is a denial of equal rights where the purpose of the closing or sale is to avoid the necessity of operating the facilities on a racially integrated basis.

"The Court is not aware of any law in North Carolina which requires a municipality to construct or operate swimming pools or other recreational facilities.

* * *

"*In the final analysis, the plaintiffs can only complain of discrimination or unequal treatment. If the*

swimming pools are closed to all, or disposed of through a bona fide public sale, there can be no unequal treatment and, therefore, no racial discrimination. No citizen of Greensboro will have access to municipal swimming facilities.

"Unless persons under the same circumstances and conditions are treated differently there can be no discrimination. No person has any constitutional right to swim in a public pool. All citizens do have the right, however, if a public swimming pool is provided, not to be barred therefrom solely because of race or color. If the swimming pools are closed or sold, the rights of all groups will be equal, and it must follow that the closing or sale will not discriminate against anyone." (Italics partially supplied)

Upon appeal the decision of the District Court was affirmed by the Court of Appeals for the Fourth Circuit which, in its *per curiam* opinion, declared (276 F. (2d) at 890):

"Faced with a demand by Negro residents of Greensboro, North Carolina, for admission to the municipal swimming pool theretofore reserved for white persons only, the City Council of Greensboro decided to close and sell the pool.

* * *

"The defendants acknowledge, as they must, that a municipality may not exclude, on account of race, members of the public from the use of any of its facilities. E. g., Dawson v. Mayor and City Council of Baltimore, 4 Cir., 1955, 220 F. 2d 386, affirmed 1955, 350 U.S. 877, 76 S.Ct. 133, 100 L.Ed. 774; Holmes v. City of Atlanta, 1955, 350 U.S. 879, 76 S.Ct. 141, 100 L. Ed. 776. On the other hand, *it is not contended by the plaintiffs that the City of Greensboro may not at will cease to provide public swimming facilities.*" (Italics supplied)

In *Gilmore* v. *City of Montgomery, supra*, Negro citizens of the city of Montgomery instituted suit to enjoin the city from operating certain city-owned parks on a racially segregated basis. Subsequently, the city closed the parks in question to all members of the public. Granting the requested injunction, effective upon the reopening of such parks, the District Court pointed out (176 F. Supp. at 780):

> "It should now be made clear that all this Court now holds is simply that insofar as is legally required *the City of Montgomery, Alabama, need not operate any public parks or make available to its citizens any recreational facilities; all public parks and all recreational facilities may remain closed for as long as the City—acting through its elected officials and agents—sees fit to keep them closed.* However, when and if the parks are reopened as public parks each must be available for the benefit of all the public regardless of race or color upon a nondiscriminatory basis." (Italics supplied)

Upon appeal the judgment of the District Court was affirmed by the Court of Appeals for the Fifth Circuit, which, in its opinion, observed (277 F. (2d) at 368-369):

> *"We agree with the district court that no law, State or Federal, requires the City to operate public parks. Closing the parks does relieve, at least temporarily, any discrimination against the plaintiffs and other Negroes.* That is, however, a Pyrrhic victory indeed, for it comes at the expense of depriving all persons in the City of public park and recreational facilities.
>
> "In its resolution closing the parks, the Board of Commissioners referred to 'grave problems involving the welfare and public safety of the citizens of the City of Montgomery,' and stated that, 'the members of the Commission are of the opinion that it is to the best

interests of the citizens of Montgomery that said parks be closed.' *That is a matter committed to the wisdom of the members of the Board of Commissioners, and is not subject to review by this Court in the absence of some violation of the Constitution of the United States.*

"Unfortunately, the public parks of the City of Montgomery are comparatively small in size. The largest, Oak Park, consists of about 40 acres in the form of a square. If public parks no larger than that are operated on a non-segregated basis, the probable breach of another right becomes imminent; that is, the right of each person to select his own associates. If the attempted operation of such small public parks on a non-segregated basis, without any advance planning, should result in the full use of all of the parks by Negroes and their non-use by whites, *then it cannot reasonably be anticipated that the City will continue to operate and maintain any parks.* Without wise advance planning, and considerable self-discipline and forbearance on the part of citizens of all races, *it may be inevitable that the City of Montgomery for a long time in the future will be totally deprived of parks and recreational facilities.*" (Italics supplied)

Especially significant with respect to the instant proceedings is the following observation of the Court (277 F. (2d) at 368, footnote 4):

"In our opinion, *the closing all of the public parks of the City does not violate the equal protection of the laws of the citizens of Montgomery under the doctrine of James V. Almond, D.C.E.D. Va. 1959, 170 F. Supp. 331; James* v. *Duckworth, D.C.E.D. Va. 1959, 170 F. Supp. 342, and Harrison* v. *Day, 1959, 200 Va. 439, 106 S. E. 2d 636.*"

In *Clark* v. *Flory, supra,* suit was instituted by Negro residents of South Carolina to enjoin alleged racial discrim-

ination in the operation of Edisto Beach State Park. While the suit was pending, the State Legislature enacted a statute providing that the park should be closed and remain closed until further action of the Legislature. Thereupon the District Court dismissed the suit as moot and stated (141 F. Supp. at 249-250):

> "Since the Edisto Beach Park has been closed by an Act of the Legislature and cannot be reopened except by another Act of the Legislature, there is no question for the Court to pass upon.
>
> * * * *
>
> "In the instant case there is no present necessity for any judgment for there is no controversy. Edisto Beach State Park has been closed to all.
>
> "*No one contends that this Court has the power to require the State of South Carolina to operate any park. This Court cannot by mandamus order the reopening of the closed park.* If it enjoined the defendants from operating a segregated park, it would be doing a futile thing, as there is no park in operation in Charleston County at the present time, nor is there any immediate prospect that the Edisto Beach State Park will be in operation.
>
> * * *
>
> "I do not feel that there is any necessity of issuing a declaratory judgment on this point *since the park is closed and no question of the rights of the plaintiffs can arise until the park is opened by Legislative action.*" (Italics supplied)

Upon appeal, the decision of the District Court was affirmed by the Court of Appeals for the Fourth Circuit in a *per curiam* opinion which pointed out that "in view of the fact

that the park had been closed by act of the Legislature, there was no basis for the issuance of an injunction with regard to its use." *Clark* v. *Flory*, 237 F. (2d) 597.

In *Willie* v. *Harris County, supra*, Negroes of Harris County, Texas, instituted suit to enjoin alleged racial discrimination in the operation of Sylvan Beach Park, a public recreational facility owned and administered by Harris County. Granting the requested injunction, the District Court admonished (202 F. Supp., at 552):

> "*While there is no constitutional compulsion directed toward a state or its subdivisions to furnish recreational facilities*, nevertheless, if the affirmative choice is made, 'So long as such facilities are open to use by the public, the only lawful and constitutional use thereof is on an equal basis without discrimination in any form on account of color or race.' Shuttlesworth v. Gaylord, Civil Action No. 9505, 202 F. Supp. 62 (D.C.N.D.Ala. 1961)."

In *Hampton* v. *City of Jacksonville*, 304 F. (2d) 319, Negro plaintiffs filed a petition praying that defendant city officials be held in contempt for violation of an injunction precluding racial discrimination in the operation of certain municipal swimming pools. The failure of the city to continue the operation of such swimming pools constituted the basis of the requested citation. Affirming a judgment of the District Court declining to hold the defendants in contempt, the Court of Appeals for the Fifth Circuit, in a brief *per curiam* opinion, observed (304 F. (2d) at 319):

> "In light of the findings of fact made by the trial court, the only remaining question present in this appeal has been decided adversely to appellants by this Court in City of Montgomery, Ala. v. Gilmore, 5 Cir.,

277 F. 2d 364. On the strength of that opinion we cannot say that the trial court erred in declining to adjudge the defendants, the appellees here, in contempt of court for failing to continue the operation of the swimming pools in the City of Jacksonville."

In *Hampton* v. *City of Jacksonville*, 304 F. (2d) 320, Negro plaintiffs instituted an action against the city and individual purchasers of two golf courses formerly owned by the city to enjoin defendants from restricting the use of the golf courses in question to white patrons. Reversing a judgment of the District Court in favor of defendants, the Court of Appeals for the Fifth Circuit held that since the golf courses were sold upon condition that they continue to be used in such manner that the public might still enjoy their benefits, with provisions for reservation of title for breach of condition, such courses could not be operated on a racially segregated basis. However, during the course of its opinion the Court emphasized (304 F. (2d) at 322):

> *"On the other hand, it is clear, and it is conceded by the appellants, that there is no requirement under the Fourteenth Amendment or otherwise that a city must continue to operate such public amusement facilities as a golf course if it decides for any reason that it no longer wishes to do so.* See Frank Hampton et al. v. City of Jacksonville, Fla., 5 Cir., 304 F. 2d 319, in which we have held that the City of Jacksonville has the legal authority to withdraw from the field of operating swimming pools completely, if it desires to do so." (Italics supplied)

Finally, in the case at bar, the Court of Appeals commented upon the situation which exists with respect to the schools of Prince Edward County in the following manner (322 F. (2d) at 337):

"Similarly, when there is a *total cessation of operation of an independent school system, there is no denial of equal protection of the laws,* though the resort of the poor man to an adequate substitute may be more difficult and though the result may be the absence of integrated classrooms in the locality.

"This we held in a different context in Tonkins v. City of Greensboro, 4 Cir., 276 F. 2d 890, affirming 162 F. Supp. 549. Faced with the necessity of desegregating the swimming pools it owned, the City of Greensboro, North Carolina, chose instead to sell them. Upon findings that the sale of the pool, which the City had theretofore reserved for use by white people only, was bona fide, it was held that *there had been no denial of the constitutional rights of the Negro plaintiffs, though the pool was thereafter operated on a segregated basis by its private owners.*

"Similarly, when a state park was closed during pendency of an action to compel the state to permit its use by Negroes on a nondiscriminatory basis, we held that closure of the park mooted the case requiring its dismissal.

"Other courts have clearly held that a municipality which had been ordered to desegregate facilities which it had operated, may *abandon the facilities without violating the injunctive order or the rights of the Negro plaintiffs.*" (Italics supplied)

This unbroken line of apposite judicial precedent establishes beyond question that the failure to operate public schools in Prince Edward County while such schools are operated in other localities of the Commonwealth infringes no rights secured to the citizens of Prince Edward County by the Fourteenth Amendment. If, as has been demonstrated, local option laws are not antagonistic to any provision of the Constitution of the United States, and if, as has also been demonstrated, a locality may close its public

schools rather than operate them on an integrated basis, certainly there can be no question of the right of local authorities to choose between two separate methods of fostering the education of its citizens.

In this connection, the Constitution and statutes of Virginia permit each locality of the Commonwealth to decide whether it will advance the education of its citizens by establishing, maintaining and operating public schools or by making available tuition grants for the furtherance of such education in nonsectarian private schools, or by a combination of these methods. Whatever decision the individual locality may make, State aid in the form of funds to assist in the support of public schools or State scholarships in furtherance of the education of children in nonsectarian private schools is available to every locality of the Commonwealth on precisely the same terms and conditions. Surely, it lies within the competency of the State to accord such a choice to its various localities, without transgressing any right secured to the citizens of any locality by the Fourteenth Amendment.

Hall v. *St. Helena Parish*, 197 F. Supp. 649 (hereinafter referred to as "Hall"), does not support an opposite view. In that case, a three-judge District Court held a certain act of the Louisiana Legislature invalid "on two counts." First because the court found the statute to be a "transparent artifice designed to deny the plaintiffs their declared constitutional rights to attend desegregated public schools" and secondly because its application in one parish "would unfairly discriminate against residents of that parish, irrespective of race." We shall presently treat with the second basis of decision. First, however, it should be made crystal clear that the decision in "Hall" was but another part of the continuing struggle between the Federal Court and the

Louisiana Legislature and that the reaction of the Court to the purpose which it attributed to the Act was so profound that no fair minded man should give weight to the second basis of the decision.

Even a casual reading of the first section of the opinion will reveal that the Court's reaction was startlingly sharp. A selected group of passages will serve to illustrate the point. Rarely will one find a more shocking opening sentence:

> "Undeterred by the failure of its prior efforts, the Louisiana Legislature continues to press its fight for racial segregation in the public schools of the State." (197 F. Supp. at 650)

Referring to the case of *Cooper* v. *Aaron*, 358 U. S. 1, for the phrase "evasive schemes for segregation" the Court said:

> "The Louisiana Legislature has confected one 'evasive scheme' after another in an effort to achieve this end. This Court has held these unconstitutional in one decision after another affirmed by the Supreme Court. Yet they continue to be enacted into law." (197 F. Supp. at 651)

Other Statements which indicate the mood of the Court follow:

> "* * * the Legislature was at pains to use language disguising its real purpose." (197 F. Supp. at 652)
>
> "* * * to the uninitiated the statute appears completely innocuous." (197 F. Supp. at 652)
>
> "* * * the *sub-surface* purpose of Act 2 * * *." (Italics supplied) (197 F. Supp. at 651)

Note the meaningful quotation marks around the word "private" and the word "closed" (197 F. Supp. at 651-655).

Having disregarded the time-honored rule to the effect that motive is immaterial in judging the validity of an Act of a Legislature and having found no improper motive on the face of the Act the Court "undeterred by the failure of its prior efforts" continued to press its fight by referring to the newspapers to discover the motive of the legislature. It declared:

> "The sponsors of this legislation * * * have spelled out its real purpose." (197 F. Supp. at 652)
>
> "* * * the purpose of the packaged plan was to keep the state in the business of providing public education on a segregated basis." (197 F. Supp. at 653)

While we believe the mood of the Court, which is indicated by its intemperate remarks, nullifies any persuasive value of the remainder of its opinion, we further confidently assert that no court could in good conscience direct such language toward Virginia.

In Louisiana the Court had before it a new enactment on "local option." Despite the repeated efforts of the Solicitor General in his brief to create the impression that the State of Virginia has engaged in a "surrender in favor of its own political subdivisions" in order to "escape liability by appointing agents" (see, Brief for the United States as *amicus curiae*, p. 21), it is clear that the "local option" situation in Virginia is not a part of any scheme or device such as was before the Court in *Hall*. In Virginia "local option" has been in effect for more than half a century. The adoption of "local option" in Virginia had no racial motive (and motive was the only racial issue in *Hall*). In Louisiana the

Court found the purpose of the local option law to be *that of keeping the state in the business of providing public education on a segregated basis*—and further the Court found that the questioned Act and related legislation would accomplish the purpose. Without waiving our firm conviction that the motive behind legislation is immaterial in judging its validity, we assert that in Virginia since "local option" had reached its majority years before the "Brown Case"—no such motive can be assigned to our laws. Why should anyone attribute such motive to Virginia when in Virginia, viewing all public schools in the State as a whole, there remains no segregated system to preserve. Further, whatever may be the effect of the laws of Virginia, they have not operated to prevent integration of the races in public schools, as this Court well knows. No one can say in good conscience that the school code and Constitution of Virginia constitute a "transparent artifice."

A comparison of the Louisiana legislation with the legislation in effect in Virginia will quickly convince one that they are completely dissimilar—one striking example is the fact that the tuition grant program of Virginia is devoid of racial connotations—in Louisiana "subsidies would afford entry to segregated schools alone" (197 F. Supp. at 659).

The attempt by the Court to escape the conclusive effect of the line of decisions inaugurated by the *Tonkins* case, *supra*, is obviously tortured and wholly unsuccessful. In this connection, the Court initially declared (179 F. Supp. at 656-657):

> "The St. Helena Parish School Board may not be discriminating geographically when it expends the full measure of its power by closing all schools under its control, but that does not make the rule of Tonkins and Gilmore applicable. Indeed, even if recreation is

> viewed in the same constitutional light as public education, the rationale of those cases applies *only when the facilities sought to be closed are locally owned, financed and administered, and the state itself is not directly concerned in their operation.* See City of Montgomery, Alabama v. Gilmore, supra, 277 F. 2d 368, note 4. In such case, only local action is involved, and so long as the closure order is general and affects all residents equally, there is no discrimination at any level. *But the same principle does not excuse inequalities in a statewide, centrally financed and administered system of public institutions.*" (Italics supplied)

The Court then proceeded to examine the character of public education and the system of public school operation in Louisiana in an effort to bring that system within the scope of the artificial exception manufactured by the Court in the concluding sentence of the above-quoted passage. In this respect, the Court observed (197 F. Supp. at 657-658):

> "There can be no doubt about the character of education in Louisiana as a state, and not a local, function. The Louisiana public school system is administered on a statewide basis, financed out of funds collected on a statewide basis, under the control and supervision of public officials exercising statewide authority under the Louisiana Constitution and appropriate state legislation.
>
> * * *
>
> "Despite defendants' argument to the contrary, none of the recent amendments to Article XII of the Louisiana Constitution have affected the control of public education by the state. See Acts 747 and 752 of 1954; Act 557 of 1958. Indeed, in its most recent form, that Article still provides for a single state system:
>
> > " 'The Legislature shall have full authority to make provisions for the education of the school

> children of this State and/or for an educational system which shall include all public schools and all institutions of learning operated by State agencies. * * *' La. Const. Art. XII, § 1, L.S.A.
>
> "Public education remains the concern of the central state government, and ultimate control still rests with the State Legislature and the State Department of Education.
>
> * * *
>
> "The plain fact is that the state has not even made a pretense of abandoning its control of education to autonomous subdivisions.
>
> * * *
>
> *"When a parish wants to lock its school doors, the state must turn the key."* (Italics supplied)

It is apparent at a glance that the public school system which the Court found to exist in Louisiana is not even remotely similar to that which has for generations been established in Virginia. In essence the Court found that control of the public schools in Louisiana "rests with the State Legislature" and that when "a parish wants to lock its school doors, the state must turn the key." *Id.* at 657-658. Quite to the contrary, in Virginia—as has been conclusively demonstrated in the case at bar—when a locality exercises its local option and elects to refrain from operating public schools, the locality turns the key. Indeed, each particular locality "must turn the key" itself, for it is perfectly clear from the decision of the Supreme Court of Appeals of Virginia in *Harrison* v. *Day*, *supra*, that the State may not do so. In the *Harrison* case, the State attempted to turn the key upon certain schools in various localities of the Commonwealth by enactment of a series of key-turning

statutes, all of which were subsequently invalidated as antagonistic to the "local option-local control" school structure embraced in the organic law of the State.

Moreover, as pointed out in Argument III of this brief, if a locality has exercised its option and declined to operate public schools, the State may not itself reopen and operate them. No clearer evidence of this truth is available than the fact that just such a situation has obtained in Prince Edward County since 1959.

However, the principal objection which counsel for the State Board raise to the Court's attempt in *Hall* to distinguish the *Tonkins* and *Gilmore* cases is not that the situation concerning the school system in Louisiana is demonstrably different from that which exists in Virginia. Our objection is rather that the purported distinction is utterly irrational and without any support whatever in logic or in law. In this connection, the Court initially stated that the rationale of the *Tonkins* and *Gilmore* cases applies *only* "when the facilities sought to be closed are locally owned, financed and administered, and the state itself is not directly concerned, in their operation." *Id.* at 657. Is this an accurate statement of the law? If the Lindley Park swimming pool in the *Tonkins* case had originally been constructed with both State and local funds under a State administered program which made State monies available to the participating localities on a matching basis, would the Court's decision in that case have been different? *Certainly it would not.* If a Virginia locality, which had elected to establish a local detention home with matching funds from the State under the Juvenile Detention Facilities Act of Virginia, subsequently elected to close that facility rather than operate it on an integrated basis, would the rule of *Tonkins* be inapplicable simply because State funds had initially been

utilized in constructing the facility? Surely, it would not. Obviously, the limitation upon the rationale of the *Tonkins* and *Gilmore* cases sought to be imposed by the Court in *Hall* is utterly artificial and wholly unsupported by the language of either of those decisions.

Finally, the Court concludes its attempt to escape the *Tonkins* rule with the observation that this rule "does not excuse inequalities in a state-wide, centrally financed and administered, system of public institutions." *Id.* at 657. Taken literally, this declaration would mean that a State may not—consistently with the Fourteenth Amendment—inaugurate a centrally financed and administered system of public parks or hospitals or libraries *without establishing one such facility in each locality of the State.* Surely, no matter how the statement is taken, it cannot mean that a State may not—consistently with the Fourteenth Amendment—institute a program which involves State aid only to localities which elect to participate in the program, i.e., a State-wide program on a local option basis. Utilizing the State-local hospitalization program established by Section 32-292 *et seq.* of the Virginia Code as an example, may not the governing body of a locality be permitted to decline participation in that program without such action infringing the constitutional rights of the citizens of that locality? If one locality declines to participate in the program, must the State—to avoid geographical discrimination—terminate State aid to localities which do elect to participate. Moreover, if a local school board should decline to participate in the National Defense Education program—which makes matching funds available to localities for approved programs of science, mathematics and modern foreign languages—*must the Federal government discontinue the program in all localities to avoid geographical discrimination?*

In short, may one locality decline to participate in a State or Federal program while the State or Federal government permits other localities to maintain such programs? The answer is obvious.

The Court's attempt to evade the decision in the *Salsburg* case, *supra,* is even more desperate and is quite properly tucked away in a footnote, 197 F. Supp. at 658 n. 29. At a time when each State could constitutionally choose whether or not it would adopt the exclusionary rule of *Weeks* v. *United States,* 232 U. S. 383, this Court decided that a State could validly refer this choice to the individual localities to be determined by local option. Counsel for the State Board submit that the principle of the *Salsburg* case would be, and still is, applicable to any subject—such as whether or not public schools will be operated—upon which the States may still make a choice. The fact that *Mapp* v. *Ohio,* 367 U. S. 643, has removed the above mentioned evidentiary rule from the area of individual State choice does not in any way affect the applicability of the *Salsburg* rationale to the operation of public schools—a matter still open to State selection. Unless this Court proposes to make the operation of public schools constitutionally compulsory on each State and on every individual political subdivision of each State—as the Supreme Court ultimately made the *Weeks* rule compulsory—the distinction attempted in *Hall* is completely irrelevant.

Nor does the attempt to emphasize that the matter under consideration in the *Salsburg* case was "procedural" rather than "substantive" add anything to the purported distinction. Substantive matters—such as whether or not certain acts shall constitute crimes in one locality and not in another under local option Sunday-closing, Sunday movies, sale of alcoholic beverages and compulsory school attendance ordi-

nances—may also be left to the individual localities without infringing any rights secured to the citizens of such localities by the Fourteenth Amendment. Counsel for the State Board submit that such irrelevant distinctions as those imagined in the *Hall* case properly deserve their footnote fate.

Considering the decision in the *Hall* case, the Court of Appeals for the Fourth Circuit declared (322 F (2d) at 337-338).

> *"The decision in Hall* v. *St. Helena Parish School Board is not a departure from the principle.* There, it appeared that, confronted with court orders to desegregate schools in certain parishes in Louisiana, the Governor of that State called an extraordinary session of the Legislature, which enacted a number of statutes designed to frustrate enforcement of the court's orders. One of the statutes provided for the closure of all schools of a parish upon a majority vote of the parishioners. It was accompanied by other statutes providing for the transfer of closed schools to private persons or groups, providing for educational cooperatives and regulating their operations, providing tuition grants payable directly to the school and not solely to the pupils and their parents, providing for general supervision of the 'private schools' by the official state and local school boards, and providing, at state expense, school lunches and transportation for pupils attending the 'private schools.' Construing all these statutes together, as it was required to do, the Court, with abundant reason, concluded that the statutes did not contemplate an abandonment of state operation of the schools but merely a formal conversion of them with the expectation that the schools would continue to be operated at the expense of the state and subject to its controls. Desegregation orders may not be avoided by such schemes, but there is noth-

> ing in the *Hall* case which suggests that Louisiana might not have withdrawn completely from the school business. *It was only because it had not withdrawn that the statutes which composed its evasive scheme of avoidance were struck down.*" (Italics supplied)

Whatever use this Court makes of *Hall*—and it is obvious from the language in its opinion that the District Court leaned heavily upon it—this Court should never lose sight of the fact that no one conceived that a single District Judge could give the relief sought. *Hall* is clear authority for the requirement of a three-judge Court in the case at bar.

Finally and the most compelling distinction between Prince Edward and St. Helena is that of remedy. In the *Hall* case, all the Court was required to do was enter an order enjoining action under a particular statute. Such is not the case in Prince Edward. In the case at bar, there is no statute before the Court for constitutional review except the tuition grant statute which has no bearing on the opening of public schools in Prince Edward County.

It is manifest from a mere reading of their brief that petitioners fully realize they cannot prevail in the instant litigation unless this Court can be induced to *change the law* in petitioner's favor. The majority opinion of the Court of Appeals in the case at bar is a fully precedented and thoroughly definitive exposition of the existing law and is absolutely dispositive of the fundamental constitutional issues contrary to the positions of the petitioners. The conclusive effect of that decision upon the petitioners can be avoided only by the judicial creation of a *new constitutional right*, which does not now exist and for which there is no warrant whatever in law.

Petitioners contend that the Fourteenth Amendment affirmatively confers upon them the right to be provided with

public schools in the political subdivision in which they reside. They claim a right, supposedly derived from the Fourteenth Amendment, to be educated in public school buildings located in Prince Edward County, staffed with public school teachers and administered by public school authorities in that county.

Petitioners' brief is suffused with oblique phrases, deliberate generalities and conscious semantics which provide abundant evidence of the dilemma in which they have placed themselves under existing law and the need for a declaration by this Court of a new constitutional right if petitioners are to succeed in this case. Thus, petitioners resort to such phrases as "the declared rights of Negro children to unsegregated public education" and "their constitutional rights to a public school education unimpaired by the burden of racial discrimination" and "equal educational opportunities in public schools . . . as commanded by the Constitution of the United States" and "the declared rights of petitioners to equal educational opportunities" and the "duty to provide unsegregated public education." See, Brief for Petitioners, pp. 3, 4, 5, 12, 23. By repetitious use of such language petitioners seek to delude all who read their brief into the belief that they not only have a constitutional right to desegregated education in *such public schools as may be operated* in Prince Edward County (which right they do possess), but that they also have a further right to compel the local authorities to operate public schools for their benefit.

Of course, this latter "right" simply does not exist, as numerous decisions have made perfectly clear. See, *James* v. *Almond, supra; Allen* v. *County School Board of Prince Edward County, supra; Griffin* v. *County School Board of Prince Edward County, supra.* Quite to the contrary, the

right of local school authorities to discontinue the operation of all public schools in a particular locality, rather than operate such schools on a racially integrated basis, is everywhere affirmed. As the Court of Appeals pointed out in the case at bar (322 U. S. at 337):

> "Other courts have clearly held that a municipality which had been ordered to desegregate facilities which it had operated, may *abandon the facilities without violating the injunctive order or the rights of the Negro plaintiffs.*
>
> * * *
>
> *"Nothing to the contrary is to be found in James* v. *Almond.* There, the Court had ordered the admission of seventeen Negro pupils into six of Norfolk's schools theretofore attended only by white pupils. Under Virginia's 'Massive Resistance Laws,' the Governor of Virginia thereupon seized the six schools, removed them from Norfolk's school system and closed them. All other schools in Norfolk and elsewhere in Virginia remained open. It was held, of course, that the statutes under which the Governor acted were unconstitutional, for Virginia's requirement that all desegregated schools be closed while segregated schools remained open was a denial of equal protection of the laws. *There was no suggestion that Virginia might not withdraw completely from the operation of schools or that any autonomous subdivision operating an independent school system might not do so."* (Italics supplied)

Continuing their attempt to incorporate an *alleged* right to be provided with public schools in Prince Edward County with their *admitted* right to racially non-discriminatory access to such public schools as may be operated in that county, petitioners assert that the election of the authorities of Prince Edward County to exercise their local option and

decline to operate any public schools constituted "open and defiant violation of petitioners' constitutional rights and the federal courts' commands." See, Brief for Petitioners, p. 25. This assertion has been given the lie both by the District Court and the Court of Appeals for the Fourth Circuit. Thus, in its memorandum opinion of June 14, 1961, the District Court—commenting upon a contention by the Attorney General of the United States that the State was unlawfully circumventing the prior orders of the Court —flatly declared (R. 167):

> "In support of this contention, the Attorney General seeks to parallel the situation in Prince Edward County with the former situation in Little Rock and New Orleans. The facts in these cases do not justify such a comparison. In the latter cases, open defiance of Federal Court orders was obvious. In Virginia this complex problem has been and is being solved in a lawful and proper manner through the courts. *There has been no known defiance of this Court's orders by either the State of Virginia or the County of Prince Edward.*" (Italics supplied)

Speaking to the same subject, the Court of Appeals for the Fourth Circuit was equally positive in its condemnation of petitioners' assertion (322 U. S. at 336):

> "The plaintiffs' theory may also be summarily dismissed insofar as it is viewed as a contention that the *closure of the schools was a violation of the order of the District Court entered in compliance with the direction of this Court.* The injunctive order, entered when the School Board and its Division Superintendent were the only defendants, required them to abandon their racially discriminatory practices. Without funds, they have been powerless to operate schools,

but, even if they had procured the closure of the schools, *they would not have violated the order for they abandoned discriminatory admission practices when they closed all schools as fully as if they had continued to operate schools, but without discrimination.*" (Italics supplied)

In light of these observations, one fact is crystal clear—at no time during the entire history of this litigation has any official of the State of Virginia or Prince Edward County ever violated or defied any order entered by any Federal court. No order has ever been entered in this litigation—nor can any order ever properly be entered—judicially commanding the local authorities of Prince Edward County to levy taxes, appropriate funds and operate public schools against their will.

In the absence of the operation of any public schools in Prince Edward County, it is manifest that petitioners' rights to "equal educational opportunities" have been fully recognized and preserved in this case. Petitioners' educational opportunities are precisely equal to those of any other child of school age in that county. Tuition grants in furtherance of their education at public schools located outside Prince Edward County or at nonsectarian private schools wherever located are—and always have been—available to petitioners upon precisely the same terms and conditions as they are available to other children of school age in the county. In this connection, the Court of Appeals pointed out (322 U. S. at 335):

"Negro citizens of Prince Edward County at first *made no effort to provide schools for their children. They declined proffered assistance in such an undertaking.* Some of their children obtained admission to

public schools in other counties of Virginia and, since 1960, *obtained or were eligible for, tuition grants when they did so.*" (Italics supplied)

Clearly, the petitioners' want of formal education for the past four years has been occasioned solely by their own conscious choice and deliberate default.

In the case at bar, petitioners come before this Court requesting that the law be broken for their benefit. They ask that the well-settled, fully precedented and everywhere recognized *constitutional right* of a locality to discontinue operation of a public facility at will be utterly destroyed, and that a new—presently nonexistent—right be created for the petitioners by this Court. Unless the petitioners are to be *unequally* favored over other children throughout the nation, the declaration they seek must necessarily be that every child in every political subdivision of the United States has a constitutional right under the Fourteenth Amendment to be educated in public schools located in the political subdivision in which he resides, and no political subdivision in the nation may, consistent with the Fourteenth Amendment, elect to further the education of its citizens by tuition grants or scholarship funds or educational television or any form of education other than that disseminated in public school buildings owned, operated and administered by public school authorities.

Counsel for petitioners do not even attempt to cite one line or one word of decisional authority—or refer to any historical context of the Fourteenth Amendment—from which even remote justification for such an appalling declaration can be derived. On the contrary, they call upon this Court simply to make the bland assertion that it is so. Obviously, the constitutional right they seek to have this

Court create must be "manufactured out of whole cloth." *Wesberry* v. *Sanders*, ... U.S. ..... (dissenting opinion).

If this Court accedes to petitioners' request, what relief can the Court give? The Solicitor General in his brief suggests that the ultimate solution to this case lies in an order directing the Board of Supervisors of Prince Edward County to levy a tax and appropriate the proceeds for the operation of public schools in the County. As authority for this astounding proposition he cites cases that are not remotely in point. See, Brief for the United States, Amicus Curiae, p. 38. At this point in his brief the Solicitor General lays down bald principles without rationale or comment and cites supposedly supporting authority without a shadow of analysis of the cases cited, their factual background nor the legal premise on which a particular result was predicated.

We reiterate our bald assertion that not one of the cited cases is remotely in point. Nine cases are cited by the Solicitor General as covering his assertion that there is no "inhibition to a form of decree which expressly directs the county authorities to levy necessary taxes." Let us examine the cases. In all nine of the cases the plaintiff is seeking to recover a debt. In all nine a judgment for a sum certain is involved. In all nine the plaintiff was asserting a contract right. Where, then, is the similarity? Why are they said to control? The only similarity is that in the eight cases involving bonds of counties or cities, the Court directed the legislative body involved to perform its contract obligation to lay a tax, and in *Virginia* v. *West Virginia*, 246 U. S. 565, posed a threat to West Virginia that it might require the State to levy a tax to meet the obligation which the State assumed in becoming a separate state. In not one of the cited cases did the Court perform the

original legislative function of determining whether or not the taxpayers' money should be expended in a particular way. In each of the cases cited, the legislative body involved had already determined upon the expenditure—the people or their representatives had decided to aid the railroad, build the bridge, construct the highway or assume the obligation. In each case the legislative body involved had engaged in a binding agreement to raise the necessary funds by taxation to be expended for such purpose. The legislative action necessary to create the debt and impose upon the people an obligation to pay it with their taxes had been taken by their chosen legislative officials. All that remained was to pay the debt. Upon those facts this Court in the eight bond cases, required the legislative body involved to perform a duty which was no longer discretionary even under state law. The Court required compliance with the terms of an agreement—discretion was no longer involved for it had already been exercised. In those cases, it is clear that the Court acted to vindicate a liquidated *contract* right—not a constitutional right—and accorded the plaintiffs only that relief which they would have been awarded under State law had the case been instituted in a State Court. In *Virginia* v. *West Virginia, supra*, while a contract approved by the Congress of the United States was involved and a judgment for a sum certain was held by the plaintiff, this Court did not enter an order in the nature of a mandamus. The Court clearly founded its jurisdiction upon Article III, Sect. 2 of the Constitution that "the judicial power shall extend * * * to controversies between two or more states." This distinction alone makes the case meaningless in the context of the case at bar, but interestingly enough the Court considered one facet of the problem which confronts this Court (246 US at 604):

> "But this does not dispose of all the contentions between the parties on the subject, since, on the one hand, it is insisted that the existence of a discretion in the legislature of West Virginia as to taxation precludes the possibility of issuing the order, and, on the other hand, it is contended that the duty to give effect to the judgment against the state, operating upon all state powers, excludes the legislative discretion asserted and gives the resulting right to compel. But we are of opinion that we should not now dispose of such question, and should also now leave undetermined the further question, which, as the result of the inherent duty resting on us to give effect to the judicial power exercised, we have been led to consider on our own motion—that is, whether there is power to direct the levy of a tax adquate to pay the judgment and provide for its enforcement irrespective of state agencies."

Looking then at the case at bar as contrasted with the cited case just discussed, we see the glaring differences. In Prince Edward County there is no debt, no judgment for a sum certain and no contract which may be impaired by the failure to act or by the repeal of a law. In Prince Edward the duly elected legislative body—far from creating a debt and determining that the funds of the taxpayer shall be expended for public schools—has determined to the contrary. Who is to say them nay? Are the people of Prince Edward County to be taxed without representation? Will this Court assume unto itself the legislative function of the Board of Supervisors of the County? We need not engage in futile discussion of whether the elected representatives of Prince Edward County are wise or unwise in their decision not to operate public schools. We need only establish that, if the decision be unwise, the Board of Supervisors of Prince Edward County possesses the sole authority and right to make that decision for the people of the county. If the law

be otherwise, whence came the law? The highest tribunal in the State has found that under State law and the State Constitution, the Board of Supervisors has discretion in the matter and is not subject to mandamus nor compulsion by the General Assembly. *Griffin* v. *Board of Supervisors, etc., supra.* It is manifestly clear, and there is nothing in *Brown* to the contrary, that Virginia's people reserved to themselves, under the 10th Amendment and the State Constitution the right to place control of the operation of their public school system in the hands of local agencies. It is true that this Court held in *Brown* that at some undetermined time between the decision in *Plessy* v. *Ferguson*, 163 U. S. 537, decided in 1896 and May 17, 1954 (the date of *Brown*) the Constitution of the United States was altered by a change in conditions—but clearly before *Brown*, the people of Virginia were free to delegate to political subdivisions the entire control over the public schools in a locality. *Brown* altered the situation only with respect to equality of treatment of members of different races in *such schools as are operated.* The people made the delegation of power to localities when they first made provision for State aid to local schools in 1902. The delegation had nothing to do with *Brown*, nothing to do with race and nothing to do with obeying this Court. In 1902, it never occurred to any Virginian that this Court would someday assume control of even the racial composition of the schools. But when did the Constitution make this latest change which the Solicitor General announces? Is it seriously thought that a Federal Court can require Prince Edward's Board of Supervisors to lay a tax and to operate public schools in that County? If so, how much shall the tax be? What shall be the objects of taxation? What shall be the tax rate? What facilities shall be offered? How many schools shall operate? How

many days each year and how many hours each day? What will be a "public school"? How many students may occupy a classroom and what qualifications must the teacher have? What subjects shall be taught? If educational television proves eminently successful, may the governing body determine to substitute such a system or must public school buildings remain open?

All of these complex considerations, and more, are involved in the legislative decisions which the Solicitor Genral calmly asks this judicial body to make. But, as we have previously noted, no such considerations were involved in decisions which he cited in fancied support of the appalling proposition that this Court is vested with judicial authority to so determine and by decree compel.

We respectfully submit that this Court, no matter how great the desire of its individual members to right what they may perceive to be a wrong, will not disregard every vestige of judicial restraint and launch out into a new and uncharted sea where legislation discretion is laid waste by judicial power!

If this course is to be pursued, however, then this Court should take that action with full knowledge that it does so without prior legal precedent and contrary to the sacred principles on which this Nation was founded. For, if the Court can require a tax for schools today, tomorrow there are books and playgrounds, libraries and swimming pools, roads and bridges, medicine and old age assistance and. . . . ?

"Hard facts make bad law," but the facts are not nearly so bad as would be the hard fact that the children of Prince Edward County gain their public education and lose their respresentative form of government. In the context of this case, this Court has no authority to levy a tax or to require the Board of Supervisors or the State to do so. If it decrees

such authority, it will have amended the Constitution in a fearsome manner. The Father of our Country, in his Farewell Address, uttered words most appropriate to this occasion and while they were not contained in a Court's opinion, they should be required reading for every judge:

> "If, in the opinion of the people, the distribution of modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this in one instance may be the instrument for good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance, in permanent evil, any particular or transient benefit which the use can at any time yield."

What then is left? Only the course of action hinted at or threatened by the District Court but requested by no party to this litigation—will this Court seriously consider an injunction against the operation of schools elsewhere in the State? The distinction between *Hall* and the case at bar can in no way be better illustrated than by considering the relief requested. In *Hall* the requested Court action prevented school closing. In Prince Edward, such action is not possible, and counsel for the State Board are confident that this court will not substitute power for judgment, will not turn to a course of action requested by no party and will, therefore, not seek to satisfy "equal protection" by commanding "equal ignorance."

CONCLUSION

For the foregoing reasons, counsel for the State Board submit that this cause should be remanded to the District Court with instructions to dismiss the amended supplemental complaint as to these respondents.

Respectfully submitted,

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PROOF OF SERVICE

I, R. D. McIlwaine, III, one of counsel for the respondents herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 27th day of March, 1964, I served copies of the within Brief on Behalf of the State Board of Education and Superintendent of Public Instruction of the Commonwealth of Virginia on the several petitioners herein by mailing same in duly addressed envelopes, with first-class postage prepaid, to their respective addresses of record as follows: Robert L. Carter, 20 West 40th Street, New York, New York, and S. W. Tucker, 214 East Clay Street, Richmond 19, Virginia.

.....

Assistant Attorney General

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 592

COCHEYSE J. GRIFFIN, ET AL., PETITIONERS

v.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the court of appeals (R. 209) is reported at 322 F. 2d 332. The opinions of the district court (R. 52, 70) are reported *sub nom. Allen* v. *County School Board* at 198 F. Supp. 497 and 207 F. Supp. 349.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 1963 (R. 237). The petition for a writ of certiorari was granted by this Court on January 6, 1964 (R. 240). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The public schools of Prince Edward County, Virginia, have been effectively closed by the refusal of the county board of supervisors to levy the taxes necessary to produce the county's share of the cost of operating the schools, under a State "local option" scheme which condones such inaction. The county officials failed to raise funds because of their opposition to desegregation. At the same time, the State of Virginia operates a system of public schools, in large part with State funds, in all other counties of the State. And, while the public schools of Prince Edward County remained closed, the State and the county distributed educational tuition grants to school children, almost all of which have in fact been used in Prince Edward County for attendance at newly established "private" schools which follow a rigid policy of segregation. The county has, moreover, allowed full credit against local taxes for contributions made to the private schools.

On these facts, the questions presented are:

1. Whether the closing of the public schools of Prince Edward County by the combined action of State and local officials works a constitutionally impermissible discrimination by the State of Virginia against all the residents of the county, including the unconsenting Negro petitioners.

2. Whether the system of tuition grants and tax credits, as it operates in Prince Edward County, constitutes State support of segregation in education and thus works a constitutionally impermissible racial discrimination.

3. Whether the appropriate remedy is a decree enjoining the continued award of grants and credits while the public schools of the county remain closed, directly requiring the county supervisors to levy and appropriate the necessary initial school funds, and alternatively requiring the appropriate State officials to re-open the public schools of Prince Edward County while they maintain other public schools in the State.

INTEREST OF THE UNITED STATES

The effective implementation of this Court's decision in *Brown* v. *Board of Education*, 347 U.S. 483—which included the present case—is a matter of continuing national concern. The government has accordingly participated in the prior school cases which have come before this Court. The instant case is of general significance in that it is the first to involve—on plenary consideration—the constitutional propriety of closing all the public schools of a county to avoid desegregation.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> * * * nor shall any State * * * deny to any person within its jurisdiction the equal protection of the laws.

Section 22–126 of the Code of Virginia (1950), as amended, provides:

> Each county, city and town if the town be a separate school district, is authorized to raise sums of money by a tax on all property, subject

to local taxation, at such rate as may be deemed sufficient, but in no event more than three dollars on the one hundred dollars of the assessed value of the property in any one year to be expended by the local school authorities in establishing, maintaining and operating such schools as in their judgment the public welfare requires and in payment of scholarships for the furtherance of elementary or secondary education and transportation costs as required or authorized by law; provided that in counties with a population of more than six thousand four hundred but less than six thousand five hundred, such rate may be increased to four dollars on the one hundred dollars of the assessed value of the property therein in any one year; and provided further that in counties having a population of more than thirty-seven thousand but less than thirty-nine thousand such rate may be increased to four dollars on the one hundred dollars of the assessed value of the property therein in any one year.

Section 22–116 of the Code of Virginia provides that:

> The fund applicable annually to the establishment, support and maintenance of public schools in the Commonwealth shall consist of:
>
> (1) State funds embracing the annual interest on the Library Fund; all appropriations made by the General Assembly for public school purposes; that portion of the capitation tax required by the Constitution to be paid into the State Treasury and not returnable to the localities, and, such State taxes as the General Assembly, from time to time, may order to be levied.

(2) Local funds embracing such appropriations as may be made by the board of supervisors of council for school purposes, or such funds as shall be raised by levy by the board of supervisors or council, either or both, as authorized by law, and donations or the income arising therefrom, or any other funds that may be set apart for local school purposes.

Section 22–117 of the Code of Virginia provides that:

> No state money shall be paid for the public schools in any county until evidence is filed with the State Board, signed by the Superintendent of Schools and the clerk of the board, certifying that the schools of the county have been kept in operation for at least nine months, or a less period satisfactory to the State board; provided, however, that no county shall be denied participation in State school funds, except as provided by law, when the board of the county has appropriated a fund equivalent to that which would have been produced by the levying of the minimum local school tax allowed by law, or has levied the maximum local school tax allowed by law, provided, such appropriation or levy is based on assessments not lower than the assessments on real and personal property in such counties in the year nineteen hundred and twenty-five.

STATEMENT

Twelve years ago, the original plaintiffs in this case filed a class action in the United States District Court for the Eastern District of Virginia to enjoin discrimination on account of race or color in the

assignment of students to the public schools in Prince Edward County, Virginia. The case reached this Court in *Brown* v. *Board of Education*, 347 U.S. 483, and (together with the other cases) was ultimately remanded to the district court with instructions to fashion a decree which would enable the Negro complainants to be admitted "to public schools on a racially nondiscriminatory basis with all deliberate speed." 349 U.S. 294. Notwithstanding numerous decisions of the lower federal courts and the State courts, the mandate of this Court has yet to be obeyed. That extraordinary history merits detailed recitation.

1. On May 3, 1956, the Board of Supervisors of Prince Edward County enacted a Resolution declaring its "policy and intention" not to levy taxes or appropriate funds for public schools "wherein white and colored children are taught together under any plan or arrangement whatsoever" (R. 50).

2. During the same year, 1956, the Virginia General Assembly, as a part of its "massive resistance" scheme, greatly expanded Virginia's tuition grant program for students attending private schools.[1] The legislature also amended, pursuant to "massive resist-

[1] The present tuition grant law (Va. Code § 22-115.30 *et seq.*), which makes such grants available to any child desiring to attend a bona fide private school, is the outgrowth of various changes in this legislation made in 1959 and 1960. The history of these and other pertinent Virginia statutes and constitutional provisions is set out in the Appendix, pp. 42–56, *infra*. For a more personal account of Virginia's reaction to the *Brown* decision, see *Virginia's Massive Resistance* by Benjamin Muse (Indiana University Press 1961).

ance," the Virginia Supplemental Retirement Act so as to include within its retirement benefits, theretofore restricted to public school teachers and other State employees, teachers in private elementary and secondary schools incorporated after December 29, 1956.

3. In 1957, the district court decided that the respondents were entitled to additional time in which to solve the desegregation problem. 149 F. Supp. 431 (E.D. Va.). The court of appeals reversed and remanded with directions to enter an order requiring a prompt and reasonable start toward desegregation. 249 F. 2d 462 (C.A. 4). The response of the district court was to authorize the postponement of desegregation until 1965. 164 F. Supp. 786. In May of 1959, the court of appeals again reversed (266 F. 2d 507), ordering the immediate desegregation of the county high schools and the preparation of a plan for the desegregation of the elementary schools "at the earliest practical day."[2]

4. On June 3, 1959, the Supervisors refused to levy any school taxes whatever for the coming school year. This decision was taken in light of the fact that the "School Board of this county is confronted with a court decree which requires the admission of white and colored children to all schools of the county without regard to race or color."[3] Hence,

[2] Eleven months later, the district court, in April of 1960, entered a desegregation order pursuant to the mandate of the court of appeals (R. 18-19). In the interim the public schools in Prince Edward County were closed (R. 54).

[3] See the statement of the Chairman of the Board of Supervisors, filed in the Board's Record Book, introduced as Plain-

the schools did not reopen in the Fall of 1959.[4] They have not reopened to this day.

5. The white citizens of Prince Edward County formed, and the State chartered, the "Prince Edward School Foundation" (T. 162)[5] which organized several elementary schools and two high schools and opened their doors in September 1959. T. 175.[6] Enrollment in these schools was restricted to white children. T. 233–234.[7] The Foundation schools operated in 1959–60 and 1960–61 on a regular basis for a complete school year and provided the normal instruction to be ex-

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tiff's Exhibit 1 at the July 1961 hearing in the district court, and reproduced as Appendix C to the Petition herein (pp. 1c–2c).

[4] As the Supreme Court of Virginia points out in *County School Board of Prince Edward County* v. *Griffin*, — Va. —, 133 S.E. 2d 565, 576, although the General Assembly is authorized to make such other appropriations (in excess of the constitutional minimum) as it may deem best, its practice has been to provide only "matching funds," after certain minimum funds have been appropriated by the county itself. The court further found that the "constitutional minimum" funds received by Prince Edward County (about $40,000) was "wholly insufficient for operating the public schools in that county." Thus the action of the Board of Supervisors was tantamount to closing the public schools.

[5] These are references to the transcript of the hearing in the district court on July 24–27, 1961. This two-volume transcript, not part of the printed record, has been filed in this Court. Substantially the same information is found in the memorandum opinion of the district court, dated August 23, 1961, at pages 58–60 of the printed record.

[6] The two high schools were consolidated for the 1960–61 school year. T. 175.

[7] A total of 1,376 white children attended the Foundation schools in 1960–61. T. 175.

pected in public schools. The high school is fully accredited by the State Board of Education.[8]

During the first year of its operation (1959–60) the Foundation was supported entirely by private contributions and donations. T. 178–179.[9] During its second year of operation the Foundation was financed primarily with public funds. On July 18, 1960, the County Board of Supervisors enacted an ordinance providing that "parents of children who are or will be enrolled during the school year * * * in a course of systematic educational instruction or training of not less than one hundred eighty days duration or the substantial equivalent thereof" are entitled to tuition grants of not less than $100.00. And, as earlier noted, under Va. Code § 22–115.30 each child was entitled to obtain a State scholarship in the sum of $125.00 for elementary pupils and $150.00 for high school pupils.[10]

Pursuant to the county ordinance and the State law, each child attending the Foundation's elementary schools in 1960–61 obtained $225.00 in public funds, and each Foundation high school child received

[8] Pursuant to the 1956 enactment of the General Assembly, the Foundation's teachers, almost all of whom taught in the white public schools in the preceding year, did not lose retirement benefits accrued while teaching in the public schools, and were eligible to—and most did—continue under the retirement plan. T. 213, 502 *et seq.*, 183–184.

[9] From June 4, 1959, to June 28, 1960, it received $334,712.22 by this means, and its expenses were $304,470.27, or a yearly cost per student of $216.09. T. 200.

[10] Apparently, even had the County failed to enact a tuition grant ordinance, under the state law each child would have been able to obtain $240.00 in any event. See Va. Code § 22–115.34. T. 145, 267.

$250.00 from the public treasury. In short, of the $332,144.11 the Foundation obtained in tuition in 1960–61, public funds accounted for approximately $311,400.[11]

On July 18, 1960, the County Board of Supervisors enacted an ordinance allowing a real and personal property tax credit—up to 25% of the tax bill—for contributions made to any "nonprofit, nonsectarian private school located within [the] County of Prince Edward" (R. 147). Tax credits claimed and granted by the County Treasurer pursuant to this ordinance, for the school year 1960–61 amounted to $56,866.22 (T. 146–147).[12]

6. While white students were thus furnished an education, primarily at the taxpayers' expense, Negro children received little education worthy of the name. The Prince Edward County Christian Association, organized in the Fall of 1959 (T. 347), operated ten "training centers" for Negro children[13] from February through May, 1960, and fifteen centers from

[11] In addition, the Foundation obtained from June 27, 1960, to July 20, 1961, donations to its "capital fund" totalling $181,787.30; to its library fund, from September 1, 1960, to June 8, 1961, amounts totalling $12,369.65 (T. 201); other donations totalling $6,855.90; and "other" receipts in the sum of $8,072.28. T. 200. Capital fund receipts were being used at the time of trial, to construct a new school building. T. 201.

[12] The President of the Foundation testified that it could and would continue to function even without this massive assistance from the public treasury. T. 236. It did in fact continue to do so after the district court cut off its sources of public revenue (as to which, see, *infra*, p. 12).

[13] These centers were available to either Negro or white children, but no white children attended. T. 371.

November, 1960 through May 1961: T. 340.[14] The quality of instruction given was "very inadequate." T. 414–415. See, also, T. 340, 341, 360, 376, 380, 424, 441. And the centers did not meet State standards for high school accreditation or for State tuition grants. T. 454, 458. While in 1958–59 some 1800 Negro children attended the County public schools, only 650 children enrolled at the "centers" during 1961, of whom 441 finished the full term. The cost of operating all of the centers during 1961 was only $11,000.[15]

7. In response to the closing of the public schools on September 16, 1960, petitioners, on April 24, 1961, filed supplemental and amended supplemental complaints, naming the County Board of Supervisors, the State Board of Education, the State Superintendent of Education and the County Treasurer as additional parties defendant. Petitioners sought to enjoin the defendants from "refusing to maintain and operate an efficient system of public free schools in Prince Edward County * * *", and challenged the State and county financial support for the Prince Edward School Foundation.

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[14] The centers were operated mainly for "morale building" purposes and were conducted from 10:00 A.M. until 1:30 P.M., five days per week.

[15] The leaders of the Prince Edward County Christian Association decided not to charge tuition and attempt to obtain county grants because "we were not really educating anybody" (T. 344) and because they considered the grants a circumvention of the desegregation order of the federal court. T. 364. In any event, it is clear on the face of the county tuition grant ordinance, as the district court subsequently found in its 1961 opinion (see *infra*), that the centers would not qualify under the terms of the ordinance without major improvements in program and facilities.

On August 25, 1961, the district court enjoined the allowance of tuition grants and tax credits "during such time [as] the public schools . . . remain closed. R. 62–63; 198 F. Supp. 497 (E.D. Va.).[16] However, the district court "abstained" on the question of whether the public schools could lawfully remain closed, suggesting that the issue be litigated in the Virginia courts. R. 58; 198 F. Supp. at 501.

8. In response to Judge Lewis' abstention order petitioners duly filed a petition for a writ of mandamus in the Supreme Court of Appeals of Virginia, seeking to compel the County Board of Supervisors "to appropriate and make available to the [County] School Board . . . sufficient funds for the operation and maintenance for the 1961–62 school year, and subsequent terms, of such public free schools as in the judgment of the School Board the public welfare requires." The Virginia Supreme Court of Appeals, construing the Virginia Constitution and statutes,[17] held that the Supervisors could not be compelled to do so. *Griffin v. Board of Supervisors of Prince Edward County,* 203 Va. 321, 124 S.E. 2d 227 (1962).

9. Petitioners returned to the district court but respondents urged the court to abstain again or to dismiss.

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[16] The reasoning of the district court was that the tax credits and county tuition grants amounted to a circumvention of the desegregation order, and that the State tuition grants were unavailable under State law while the public schools remained closed.

[17] The court stated that "The petitioners further point out in their brief that 'there are no Federal questions [involved] in this proceeding', and we perceive none." 203 Va. at 323.

Judge Lewis refused either to dismiss or to abstain.[18] Reaching the merits, the district court found that "* * * the Board of Supervisors * * * caused the closing of the public schools in the county in order to avoid the racial discrimination prohibited by the Supreme Court of the United States * * *," and held that the public schools may not remain closed (R. 73, 80; 207 F. Supp. at 351). The district court, however, refrained from entering an order requiring the schools to reopen by September 7, 1962 (R. 80–81).

10. Somewhat more than one month later, on August 31, 1962, the Board of Supervisors and the School Board instituted a suit for a declaratory judgment in the Circuit Court for the City of Richmond, naming certain of the petitioners as defendants. The suit sought resolution of various questions involved or alleged to be involved in the federal proceeding. Having at this late date instituted another suit in the state court, the respondents now sought to persuade Judge Lewis to abstain further to await its outcome. This he refused to do, and, on October 10, 1962, he entered an order which, insofar as relevant here, (1) denied further abstention; (2) held that the County schools may not remain closed, but (3) deferred the entry of "such further orders as may be necessary and proper to require full compliance with this decree pending review by the United States Court of Appeals for the

[18] He noted that counsel for the Board of Supervisors had given an assurance that he would file a suit if petitioners failed to do so, but that respondents had not filed an appropriate answer or countersuit with the state courts. He also noted that "counsel for all parties" advised him that "none of them intends to file another suit in the State courts."

Fourth Circuit and the Supreme Court of the United States, * * *" (R. 83, 86-87). Appeals and cross-appeals were duly filed.

11. After this case had been orally argued in the court below, the Circuit Court of Richmond entered its decision on March 21, 1963. It held that the closing of schools in Prince Edward County did not violate the State or Federal Constitution; that the system of tuition grants is not a scheme for evasion of the decision in *Brown* v. *Board of Education;* and that State tuition grants were available under State law notwithstanding the closing of the public schools. It also described the operation of the Virginia school laws.

12. On August 12, 1963, the court of appeals handed down the decision from which petitioners here seek review (R. 209). Noting that the decision of the Circuit Court of Richmond had been appealed and that the case was "ripe for decision" in the Supreme Court of Appeals of Virginia, the court held that (R. 213):

> * * * the District Court properly decided in the first instance, that it should abstain from deciding the merits of the principal issue [school closing] until the relevant questions of state law had been decided by the state courts. We think it should have adhered to its abstention when resolution of the state questions by state courts was delayed because the plaintiffs, themselves, chose to withdraw them from state court consideration. We think too that abstention on the other two issues [tuition grants and tax credits] where the answers are so closely

> related to the principal issue, was the proper course. Insofar as there are federal questions present which are independent of state law * * *, we conclude that the plaintiffs have shown no ground for relief, so that abstention is not inappropriate.[19]

On December 2, 1963, the Supreme Court of Virginia rendered its decision, holding that the Virginia Constitution compels neither the State nor the county to reopen the public schools in Prince Edward County, or to furnish funds for that purpose. *County School Board of Prince Edward County* v. *Griffin*, — Va. —, 133 S.E. 2d 565.[20]

On January 6, 1964, this Court granted certiorari, setting the case down for hearing "on the merits," stating in a *per curiam* opinion that it did so "in view of the long delay in the case since our decision in the *Brown* case and the importance of the questions presented." 375 U.S. 391, 392.

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[19] Judge Bell, dissenting, believed that the order of the district court was correct and should be implemented, for two reasons: (1) because "the public school system of Virginia is maintained, supported and administered on a statewide basis by * * * Virginia; therefore, the closure of the schools of this one county constitutes discrimination," and (2) "the defendants closed the schools solely in order to frustrate the orders of the federal courts that the schools be desegregated." Observing that "[t]he plaintiffs assert a federal right guaranteed by the Constitution," he said that the majority opinion amounted to "a humble acquiescence in outrageously dilatory tactics * * *," an "abnegation of our plain duty," and "a truly shocking example of the law's delays" (R. 229, 230, 236).

[20] The opinions in the case are reproduced in full as an Appendix to the government's Memorandum in support of the petition for certiorari herein, pp. 8–45. For the convenience of the Court, references to those opinions will cite both the Southeastern Reporter and our Memorandum.

ARGUMENT

INTRODUCTION AND SUMMARY

The fundamental question presented by this case is whether the Equal Protection Clause of the Fourteenth Amendment tolerates the result revealed here: the complete abandonment of public education in one county (while the State maintains a comprehensive system of free public schools elsewhere), combined with substantial contribution of public funds to nominally private schools which practice racial discrimination. So stated, the question seems to answer itself. Yet, no one disputes the factual premise. Rather, respondents' arguments begin with disclaimers of responsibility and end by erecting obstacles to effective relief. In brief, the suggestion is that the State itself closed no schools; that the county authorities practiced no discrimination within their limited jurisdiction; and that the policy of the schools now operating in Prince Edward County is their own private affair.

In our view, those distinctions do not avail. So saying, however, we charge no conspiracy between the various respondents among themselves, or with the operators of the segregated private schools of the county. Our argument does not depend on impugning the motives of the Virginia Legislature in enacting "local option" laws which permit any county to withhold school funds. Nor do we suggest that either the State or county officials have influenced the private Prince Edward School Foundation to practice segregation. Our conclusion flows from a belief that the constitutional mandate of Equal Pro-

tection forbids the State (and the county, also) to permit so gross a discrimination to be accomplished by official action and to subsist with the support of public funds.

We begin by noticing the obvious discrimination involved in the closing of the public schools of Prince Edward County, while the State, in large part with State funds, maintains a system of public education in all other counties (Point I). Here, of course, the inequality is suffered by all the residents of Prince Edward County, white and colored. But that hardly justifies the discrimination. Though many (presumably whites) have apparently acquiesced in the scheme, we assert that those who continue to claim their right to equal treatment at the hands of the State are entitled to have the public schools which the State provides elsewhere. Since it is clear that the State itself has not withdrawn from the field of education, the device of "local option" cannot be permitted to defeat the personal rights of the unwilling minority, especially when the purpose and effect of the local decision is to perpetuate racial discrimination.

We turn next to the public support of private schools through tuition grants, tax credits and a provision permitting public school teachers to serve there without losing State benefits (Point II). Far from alleviating the territorial discrimination already noticed, that support adds a further inequality by effectively perpetuating segregation. In context, we conclude, the system of grants and credits works an impermissible racial discrimination.

Finally, we address ourselves to the appropriate remedy (Point III). Plainly, the program of State support to segregated schools must cease, at least so long as the public schools remain closed. But that injunction alone cannot relieve the prevailing territorial discrimination. Nor would it, as a practical matter, erase the relative disadvantage of the Negro in a community without public schools. Accordingly, we believe the decree must effectively compel the reopening of the State public schools in Prince Edward County. The Eleventh Amendment, it seems to us, erects no bar against such relief. Not only may the county authorities be compelled to levy the necessary taxes, but the State officials, also, are properly amenable to an injunction which restrains continued discrimination against the school children of the county.

I

THE CLOSING OF THE PUBLIC SCHOOLS IN PRINCE EDWARD COUNTY WORKS AN IMPERMISSIBLE DISCRIMINATION AGAINST ALL THE RESIDENTS OF THE COUNTY, PARTICULARLY THE UNWILLING NEGRO POPULATION

We begin with two certainties: The first is the basic rule derived from the Equal Protection Clause of the Fourteenth Amendment that no State, without compelling justification, may withhold from some of its citizens educational benefits which it grants to all others; the second is the uncontested fact that nothing in the situation of Prince Edward County would justify such a direct discrimination against its inhabitants. So much is beyond dispute. The governing principle here is that "where the state has undertaken to provide it, [public education] is a right which must

be made available to all on equal terms." *Brown* v. *Board of Education,* 347 U.S. 483, 493. The benefit of the precept of course runs to everyone, no matter where he lives, regardless of race. Specifically, it bars the arbitrary denial of educational opportunities on the basis of residence. For, whatever the permissible scope of territorial distinctions in other matters,[21] "* * * it is clear enough that, absent a reasonable basis for so classifying, a State cannot close the public schools in one area while, at the same time, it maintains schools elsewhere, with public funds." *Hall* v. *St. Helena Parish School Board,* 197 F. Supp. 649, 656, (E.D. La.), affirmed, 368 U.S. 515. See, also, *Bush* v. *Orleans Parish School Board,* 187 F. Supp. 42, 188 F. Supp. 916 (E.D. La.), affirmed, 365 U.S. 569; *Aaron* v. *McKinley,* 173 F. Supp. 944 (E.D. Ark.), affirmed *sub nom. Faubus* v. *Aaron,* 361 U.S. 917; *James* v. *Almond,* 170 F. Supp. 331 (E.D. Va.),

[21] For permissible geographic classification, see, *e.g.*, *McGowan* v. *Maryland*, 366 U.S. 420 (Sunday closing law); *Salsburg* v. *Maryland*, 346 U.S. 545 (rules of evidence); *Radice* v. *New York*, 264 U.S. 292 (night restaurant employment for women); *Packard* v. *Benton*, 264 U.S. 140 (security required of carriers for hire); *Ocampo* v. *United States*, 234 U.S. 91 (right to preliminary examination); *Toyata* v. *Hawaii*, 226 U.S. 184 (license fee for auctioneers); *Gardner* v. *Michigan*, 199 U.S. 325 (jury selection procedures); *Mallett* v. *North Carolina*, 181 U.S. 589 (appeal procedures); *Mason* v. *Missouri*, 179 U.S. 328 (election laws); *Chappell Chemical & Fertilizer Co.* v. *Sulphur Mines Co. (No. 3)*, 172 U.S. 474 (jury trial rules); *Budd* v. *New York*, 143 U.S. 517 (maximum charges by grain elevators); *Hayes* v. *Missouri*, 120 U.S. 687 (number of peremptory challenges); *Missouri* v. *Lewis*, 101 U.S. 22 (appeal procedures).

On the other hand, forbidden territorial discriminations are illustrated by the recent decision in *Gray* v. *Sanders*, 372 U.S. 368.

appeal dismissed per stipulation, 359 U.S. 1006; *Duckworth* v. *James*, 267 F. 2d 224 (C.A. 4), certiorari denied, 361 U.S. 835. Since there is, of course, no concealing the fact that the public schools of Prince Edward County were closed for the sole purpose of avoiding outstanding desegregation orders, it would seem to follow that the unjustifiable discrimination against the residents of the county must be corrected.

In answer, the State makes two representations. The central State officials insist that the closing of the Prince Edward schools was not their doing, but resulted from a purely local decision to discontinue the school tax. And they add that, in any event, they are now powerless, as a matter of State law, to require the re-opening of those schools or to furnish funds for that purpose until and unless the county authorities reverse their decision and provide the initial moneys. The same arguments, of course, are not open to the local county respondents, who made the deliberate choice to close their public schools and have plain power to reopen them. But, for their part, they say they are guilty of no discrimination, having shut all the county schools and having no control over the expenditure of public funds for schools outside their jurisdiction. Thus, all the respondents disclaim responsibility for the existing discrimination in the distribution of State educational benefits.

We do not agree. The fundamental guarantee of equal treatment at the hands of the State cannot be thwarted by the fragmentation of decisionmaking. In principle, the Fourteenth Amendment speaks to the State and enjoins it from discriminating against "any

person within its jurisdiction." Doubtless, when the matter is wholly local, the injunction runs only against the municipality or subdivision concerned. See, *e.g.*, *Tonkins* v. *Greensboro*, 276 F. 2d 890 (C.A. 4); *City of Montgomery, Alabama* v. *Gilmore*, 277 F. 2d 365 (C.A. 5). But in the usual case, the constitutional obligation binds the State itself and it cannot be avoided by delegating to others the power to make the discriminatory decision. So long as the State remains involved, no abdication of authority will avail, even when power is transferred to private hands. *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 725; *Cooper* v. *Aaron*, 358 U.S. 1, 19. Cf. *Terry* v. *Adams*, 345 U.S. 461. *A fortiori*, the State cannot insulate itself from responsibility for a decision which results in individious discrimination by a surrender in favor of its own political subdivisions. That would be like permitting the principal to escape liability by appointing agents. Nor does it matter if the local majority indicate a willingness to forego the benefit of the Equal Protection Clause. "One's right to life, liberty and property * * * and other fundamental rights may not be submitted to the vote; they depend on the outcome of no elections." *Board of Education* v. *Barnette*, 319 U.S. 624, 638. See *Boson* v. *Rippy*, 285 F. 2d 43, 45 (C.A. 5). As this Court said in another context, "[i]t is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence." *Frost & Frost Trucking Co.* v. *Railroad Commission of California*, 271 U.S. 583, 594.

The cases dealing with "local option" do not sustain the respondent's position for they are not inconsistent with the principle that the Equal Protection Clause bars a State from introducing irrational territorial classification, whether it acts through one legislature or several political subdivisions. The ultimate question is always whether the State has engaged in arbitrary or capricious discrimination. Not all territorial distinctions are reasonable, albeit in many areas there is very broad discretion because geographical classifications are seldom invidious and local conditions may usually be presumed to justify divergencies in police regulations. Whether a given territorial distinction is reasonable, or arbitrary or capricious, depends upon a number of factors.

One question is whether the territorial classification reflects differences in local conditions that are relevant to the subject matter of the discrimination. Physical or economic environment might justify differences in laws pertaining to noise, smoke or the keeping of animals, but it would not support giving the vote to citizens who had reached the age of 18 in one city while denying it to those under 25 in another. Local conditions may explain variations in the organization and procedure of the courts[22] but they could hardly justify entirely disallowing appeals in criminal cases in urban areas while permitting them in the country.

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[22] See, *e.g.*, *Missouri* v. *Lewis*, 101 U.S. 22; *Hayes* v. *Missouri*, 120 U.S. 687; *Gardner* v. *Michigan*, 199 U.S. 325; *Salsburg* v. *Maryland*, 346 U.S. 545.

Second, there are subjects upon which the attitude of the local community may furnish a reasonable ground for classification, partly because local mores are relevant legislative considerations in exercising the police power in sundry areas such as those involving views of public morality, for example, horse racing and the closing of business establishments on Sunday, and partly, perhaps, because of an interest in local rule. Thus, the Court has steadfastly refused to review a locality's decision to permit or prohibit the sale of intoxicating liquor. *Rippey* v. *Texas*, 193 U.S. 504; *Ohio* v. *Dollison*, 194 U.S. 445.[23] Valid local option laws often bring togther the first and second considerations; that is to say, the decision of the local subdivision will not only reflect a determination by those most familiar with the facts concerning the existence of local conditions supporting one classification or another, but it will also be an expression of local attitudes and an exercise of local self-rule.

Third, the subject matter of the discrimination is of particular relevance.[24] This is a familiar principle

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[23] Cf. *Ft. Smith Light Co.* v. *Pacing Co.*, 274 U.S. 387, 391; *Salsburg* v. *Maryland*, 346 U.S. 545, 552; *McGowan* v. *Maryland*, *supra*, 366 U.S. at 537, n. 138 (concurring opinion of Mr. Justice Frankfurter).

[24] Thus, there are decisions of state courts invalidating local option laws on the ground that the matter involved is too important to permit of variations among counties. See *In Re Municipal Suffrage to Women*, 160 Mass. 586, 36 N.E. 488, 490, *Opinion of the Justices*, 328 Mass. 674, 105 N.E. 2d 565; *Hobbs* v. *Lawrence County*, 193 Tenn. 608, 247 S.W. 2d 73; compare *State* v. *Neveau*, 237 Wisc. 85, 294 N.W. 796, 804; cf. *Wright* v. *Cunningham*, 115 Tenn. 445, 91 S.W. 293. See, also, Cooley, *Constitutional Limitations* (7th ed.) 172-173, 174.

in the application of the Equal Protection Clause, which is no less relevant in respect to geographical classification. Minor differences that will support differentiations in police regulation, taxation and economic legislation [25] may be wholly inadequate to justify discrimination in respect to more fundamental human rights. Thus, the technical distinctions between larceny and embezzlement may support differences in criminal procedure and sentencing, but would not justify sterilization in the case of one type of offender and not in the case of the other. *Skinner* v. *Oklahoma,* 316 U.S. 535. A State may favor rural areas in its tax or regulatory legislation, but equal protection forbids favoritism in weighting the votes for State-wide officials. *Gray* v. *Sanders,* 372 U.S. 368. By the same reasoning the interest in local self-rule, especially if coupled with differences in attitudes and conditions, will doubtless support geographical distinctions in such matters as zoning ordinances and licensing laws. But deference to local conditions and preferences could hardly justify geographical classifications with respect to the defendant's right to some form of appeal in criminal cases or the availability of a transcript for paupers. Cf. *Draper* v. *Washington,* 372 U.S. 487; *Griffin* v. *Illinois,* 351 U.S. 12.

The foregoing analysis is sustained by the decisions of this Court. In passing upon legislation creating

[25] See, *e.g.*, *Budd* v. *New York*, 143 U.S. 517; *Toyata* v. *Hawaii*, 226 U.S. 184; *Packard* v. *Benton*, 264 U.S. 140; *Radice* v. *New York*, 264 U.S. 292; *McGowan* v. *Maryland*, 366 U.S. 420.

territorial differences within a State the Court has quite uniformly assumed that the discrimination must have a rational basis in local conditions. *E.g., Fort Smith Light Co.* v. *Paving District,* 274 U.S. 387; *Salsburg* v. *Maryland,* 346 U.S. 545; *McGowan* v. *Maryland,* 366 U.S. 426.[26] The cases also recognize that the division of governmental power between a State and its subdivisions is largely irrelevant in determining whether there is a denial of equal protection of the law. Thus, the Court has repeatedly reasoned that any classifications which may be drawn through local option may also be provided by the legislature. *E.g., Fort Smith Light Co.* v. *Paving District,* 274 U.S. 387, 391; *Salsburg* v. *Maryland,* 346 U.S. 545, 552; *McGowan* v. *Maryland,* 366 U.S. 426, 537, n. 138 (concurring opinion of Mr. Justice Frankfurter). Since the State itself may make only rational geographical differentiations, it would seem to follow that the interest in local self-government will not support a discrimination that could not constitutionally be made by the legislature itself. We need not press the point so far, however. For present

[26] State courts have struck down territorial distinctions lacking rational basis as violating the Equal Protection Clause. See, *e.g., Commissioner* v. *Ladutko,* 256 App. Div. 775, 777, 11 N.Y.S. 2d 747 (1st Dep't), affirmed per curiam, 281 N.Y. 655, 22 N.E. 2d 484; *Commissioner* v. *Torres,* 263 App. Div. 19, 31 N.Y.S. 2d 101 (1st Dep't); *The Fronton, Inc.* v. *Florida State Racing Commission,* 82 S.E. 2d 520, 523 (Fla.); see, also, *State* v. *Harris,* 216 N.C. 746, 753, 6 S.E. 2d 854; *State* v. *Neveau,* 237 Wisc. 85, 294 N.W. 796; *Chapel* v. *Commonwealth,* 197 Va. 406, 89 S.E. 2d 337, 343. Cf. *People ex rel. Adamowski* v. *Wilson,* 20 Ill. 2d 605, 170 N.E. 2d 605, 612–613 (Schaefer, C.J.).

purposes it is enough that local option does not render valid a discrimination that finds no rational justification even in the interest in local self-rule.

Judged by these criteria the geographical discrimination between children in Prince Edward County and children in other parts of Virginia in relation to primary and secondary school education is utterly irrational. No one even suggests that there are local differences in the physical environment or the local economy that affect the need for, or the value of, education or even the ability of the county to afford it. One can conceive of local social and economic characteristics that might justify a distinction as to the character of the education offered in the higher grades, whether to emphasize the mechanical trades or liberal arts for example, but none are relevant to the need for *some education.*[27]

Education (perhaps as distinguished from the character of education) cannot be fairly likened to the traditional subjects of local option on which local attitudes, mores and customs are relevant in a pluralistic society. The interest in local self-government is plainly insufficient to justify a State in discriminating among its children by providing some with an education and others with none. Equality of opportunity to obtain a basic education is too fundamental [28] to be

[27] It is perfectly clear that an offer to provide tuition grants if private schools are organized is not the equivalent of a public education. Cf. *Missouri ex rel. Gaines* v. *Canada*, 305 U.S. 337; see, also, the opinion of the court below, 322 F. 2d at 336.

[28] See *Brown* v. *Board of Education*, 347 U.S. 483, where this Court said (at 493):

> [Education] * * * is a principal instrument in awakening the child to cultural values, in preparing him for later

outweighed by local preferences. That is the universal view, absent massive resistance to desegration. In all fifty States, provisions for free public education are included in the constitution and general statutes. No State remains altogether indifferent to what the localities do. Thus, in a decision requiring a local community to levy taxes for school purposes, *City of Louisville* v. *Commonwealth for School Board,* 134 Ky. 488, 492–493, 121 S.W. 411, the Kentucky Court of Appeals said:

> * * * education is not a subject pertaining alone, or pertaining essentially, to a municipal corporation. Whilst public education in this country is now deemed a public duty in every State, * * * it has never been looked upon as being at all a matter of local concern only * * *. In this State the subject of public education has always been regarded and treated as a matter of State concern.

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professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

Accord: *Grant* v. *Michaels*, 94 Mont. 452, 23 P. 2d 266, 271; *Piper* v. *Big Pine School District*, 193 Cal. 664, 226 Pac. 926, 930. There is no doubt but that a person's ability to secure remunerative employment and hence his relative income level are a function of his educational attainments. See, *e.g.*, *Department of Commerce, Statistical Abstract of the United States*, 1960, p. 110; cf. *The Pursuit of Excellence: Education and the Future of America*, Rockefeller Brothers Fund Report, p. 7. "Opportunities for securing employment are often more or less dependent upon the rating which a youth, as a pupil of our public institutions, has received in his schoolwork." *Grant* v. *Michaels*, *supra*.

Similar rulings are to be found in most jurisdictions. See, *e.g.*, *Malone* v. *Hayden*, 329 Pa. 213, 197 Atl. 344, 352; *Bissel* v. *Harison*, 65 Conn. 183, 32 Atl. 348, 349; *People ex rel. Nelson* v. *Jackson Highland Bldg. Corp.*, 400 Ill. 353, 81 N.W. 2d 578; *Grant* v. *Michaels*, 94 Mont. 452, 23 P. 2d 266; *County Board* v. *Board of Commissioners*, 201 Ga. 815, 41 S.E. 2d 398; *Hobbs* v. *Lawrence County*, 193 Tenn. 608, 247 S.W. 2d 73, 76 (dictum); *Moseley* v. *Welch*, 209 S.C. 19, 39 S.E. 2d 133, 140; *Duncan* v. *People ex rel. Moses*, 89 Colo. 149, 299 Pac. 1060; *Fiscal Court* v. *Board of Education*, 294 Ky. 758, 172 S.W. 2d 624; *Mayor & City Council* v. *State ex rel. Du Pont*, 44 Del. 332, 57 A. 2d 70; *Posey* v. *Board of Education*, 199 N.C. 306, 154 S.E. 393; *Franklin* v. *Hinds*, 101 N.H. 344, 345, 143 A. 2d 111. See, also, the opinions of the Louisiana courts recited in *Hall* v. *St. Helena Parish School Board, supra*, 197 F. Supp. at 657.

Virginia herself does not treat primary and secondary education as truly a matter for local option. There is not the slightest doubt that the public school system in Virginia for a century has been, and remains, a *State* system. The current statutes detailed in the Appendix, *infra*, pp. 44–46, 53, 55–56, make that plain. Nor does the recent decision of the Virginia Supreme Court of Appeals cloud that conclusion. On the contrary, it is there expressly stated that "the local school boards are * * * agencies of the State." *County School Board of Prince Edward County* v. *Griffin, supra*, 133 S.E. 2d 565, 577 (Memo. 30). Moreover, the central State authorities set the standards and retain important functions of supervision and

administration. And State funds today provide about half the cost of running the schools. See Appendix, *infra*, pp. 55–56. This is not truly self-government of public education but a local determination whether the children of Prince Edward County are to have equal educational opportunities—equal not only in respect to race but also equal to those offered other Virginia children. The interest in local self-government upon such a question is not enough, assuming it to be otherwise relevant, to justify discrimination among children whose situation and need for education is the same. The geographical classification, being utterly irrational under all the circumstances, violates the Fourteeth Amendment.

The discrimination in the present case may be held to be a denial of equal protection upon narrower grounds. Fairly analyzed, what Virginia has done is to refer to county officials the decision whether to comply with the Equal Protection Clause and desegregate the public schools or to attempt to circumvent the constitutional requirement by substituting a segregated system of so-called "private schools" taught by State-aided teachers with the financial backing of tax credits and State tuition grants. At a minimum, the State must be held responsible for ensuring that the choice of a locality not to have schools is not exercised for a completely arbitrary or impermissible reason.

The only difference between Prince Edward County and other parts of Virginia is that many of the people of Prince Edward County (or at least their representatives) reject the idea of desegregated ed-

ucation. As the Court said in *Brown* v. *Board of Education*, 349 U.S. 294, 300, "the vitality of * * * constitutional principles cannot be allowed to yield simply because of disagreement with them." The will to deny equality to Negro children in order to preserve segregation will not support a geographical classification. Resting as it does upon a purpose to perpetuate an invidious discrimination, the closing of the public schools in Prince Edward County violates the Equal Protection Clause of the Fourteenth Amendment. Cf. *Gomillion* v. *Lightfoot*, 364 U.S. 339.

Our quarrel is not with the distribution of power between the State and its subdivisions either in raising taxes or in administering the school system. Our submission is that from the constitutional viewpoint it is irrelevant how the power is actually distributed. Any distribution is constitutional so long as no grievous discrimination in educational opportunities results. If there is discrimination, the distribution will not save it. A State which maintains and supervises a public school system, either through the State government or local subdivisions, or some mixture of the two, cannot permit the residents of one county to be denied equal treatment with others. Virginia has not discharged her constitutional duty by abdicating decision. So long as there are some in Prince Edward County who wish the schools the State operates elsewhere, they are entitled to be satisfied. Whether it is appropriate to hold the county authorities accountable as "successors," or to require direct compliance from the State is a question of remedy. See *infra*, p. 35ff. In either event, Virginia

must respond. As Virginia's Chief Justice said, "in its final analysis, the default is a default of the State." *County School Board of Prince Edward County, Virginia* v. *Griffin, supra,* 133 S.E. 2d at 584 (Memo. 45) (Eggleston, C.J., dissenting).

II

THE PUBLIC SUPPORT OF PRIVATE SEGREGATED SCHOOLS IN PRINCE EDWARD COUNTY WORKS AN IMPERMISSIBLE DISCRIMINATION AGAINST NEGRO RESIDENTS OF THE COUNTY

The previous discussion yields the conclusion that the closing of the public schools in Prince Edward County works an unjust discrimination against all the unwilling residents of the county, even if the factor of race were not involved. So far as we are aware, there is no pretense that this inequality is corrected by the availability of State or local educational tuition grants, good for attendance at non-sectarian private schools within the county, or public schools outside. Nor could there be, since the grants are available throughout the State, as a supplement to, not a substitute for, a system of State-operated schools.[29] Indeed, far from remedying the inequality, the Virginia system of tuition grants, combined with important other support of segregated private schools in Prince Edward County, actually aggravates the discrimination against some of the residents of the county—specifically, the Negro school children. Thus, racial discrimination is added to the territorial discrimination.

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[29] See *County School Board Board of Prince Edward County* v. *Griffin, supra,* 133 S.E. 2d at 578–579 (Memo. 32–34); Code of Va. (1962 Supp.), §§ 22–115.29 through 22–115.35, recited in the Appendix, *infra,* pp. 52–55.

1. It is admitted, we suppose, that the emergence of the Prince Edward School Foundation, whose schools most of the white students of the county have attended since 1959,[30] was the inevitable consequence of closing the public schools in the area. So, also, it might have been anticipated that the Negro community, to the extent of their more limited means, would establish "private" schools for their children. But, given the temper of the times, it was plain the new white schools would not admit Negro students unless legally compelled to do so. Thus, it is fair to say that the closing of the public schools, of itself, decreed a perpetuation of segregation.

That fact alone may condemn the *status quo* in Prince Edward County. For it is clear that the State legislature paved the way for this result by increasing local option[31] and that the county supervisors took their action with the express purpose of defeating the opportunity of Negro children to attend desegregated schools.[32] Such action, taken for such a motive,

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[30] For the 1960–61 school term some 1,332 applications for state grants were filed, and 1,363 applications for local grants (T. 113, 127–128, 237) of which all but five were for attendance at the Foundation Schools (T. 130, 136). During the same year the Foundation schools had 1,376 pupils (T. 175). During the 1958–59 school year approximately 1,500 white children had been enrolled in the public schools of the county (T. 255, 305).

[31] Prior to the "massive resistance" legislation of 1956, the county supervisors were given wide discretion as to *how much* to provide for schools, but they were required to levy a minimum school tax, which the local electorate, by referendum, could increase. See Va. Code 1950, § 22–126. Both the statutory minimum and the referendum provision were deleted in 1956. See Appendix, *infra*, n. 5, pp. 49–50.

[32] See Statement, *supra*, p. 617.

and leading inexorably to the destruction of the right to attend public schools on an equal basis, may well run afoul of the constitution. See *Gomillion* v. *Lightfoot*, 364 U.S. 339, and cases there cited.

2. But we do not rest our argument there. Whatever the propriety of a total State withdrawal from the business of education to avoid the constitutional prohibition against public discrimination on account of race—assuming no resulting territorial discrimination—it is clear the State cannot, in any guise, continue to support racial discrimination in education. "State support of segregated schools through any arrangement, management, funds or property cannot be squared with the Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws." *Cooper* v. *Aaron* 358 U.S. 1, 19; see, also, *id.* at 4. Virginia has violated that injunction.

The proof is overwhelming. At the outset, we notice the State and local tuition grants. On their face, of course, the grants are good for any nonsectarian private school, white, Negro, or mixed. But there is no disguising the fact that there were no nonreligious desegregated private schools in Prince Edward County (T. 56–57, 72–73), and none likely to be established.[33] The net of it, then, is that the grants are

[33] The "training centers" operated by the Prince Edward County Christian Association during a part of the period were at best makeshift schools, apparently ineligible for tuition grants. In any event, though they were theoretically open to both races, only Negroes in fact attended. See Statement, *supra* pp. 10–11. The Prince Edward Free School, inaugurated in the Fall of 1963, is a stopgap arrangement scheduled to continue for only one year. Only eight white students attend.

"one-way tickets," good only for entry to segregated schools. See *Goss* v. *Board of Education,* 373 U.S. 683, 687. That is, of course, how they have in fact been used: For the school year 1960–61, of 1,363 tuition grants awarded to Prince Edward County school children, all but five were for attendance at the all-white Prince Edward School Foundation schools (R. 189).

This statistic highlights another consideration. While the grants have since ceased under the district court's injunction, it is plain they facilitated the creation and operation of the Foundation schools.[34] Moreover, the State facilitated the establishment of the new schools in another important respect. As part of the "massive resistance" legislation of 1956, Virginia permitted public school teachers to transfer to newly-organized private schools while remaining within the retirement system and retaining benefits accrued while teaching in the public schools. It would be difficult, we think, to exaggerate the boon thus conferred on the Foundation, now enabled to compete for the local white teachers with public schools in the adjacent areas.

[34] Of course, the effect of the tuition grant support cannot be obfuscated by claiming the funds go to the pupil, not the school. The Virginia Supreme Court of Appeals squarely rejected just such an argument in *Almond* v. *Day*, 197 Va. 419, 89 S.E. 2d 851, where it invalidated tuition grants to private school pupils prior to a 1956 Amendment to the Virginia Constitution authorizing such grants. And, in its order granting certiorari in this case, this Court recognized the facts by stating that "* * * the Prince Edward Foundation * * * has received state support." 375 U.S. 391. As *Almond* v. *Day* held, unlike such matters as school bus transportation, cf. *Everson* v. *Board of Education*, 330 U.S. 1, tuition grants are the "very life blood" of a school.

Nor is this all. As we have noted, Prince Edward County also accorded full credit against local taxes for contributions to the white Foundation. This, of course, is no ordinary exemption for "charitable" gifts, but an unusual, and direct, contribution by the county to the schools. In 1960–61, the benefit amounted to $56,000.

In sum, the State and county have given significant support to private schools, which—whether or not officially encouraged to do so—practice racial discrimination. Such support plainly runs afoul of the Constitution when, in a given community, it constitutes the only link between the State and education, committing all available public funds and the entire weight of official aid in the single direction of perpetuated school segregation. *Cooper* v. *Aaron, supra,* is dispositive on this point. See, also, *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715; *Simkins* v. *Moses H. Cone Hospital,* 323 F. 2d 959 (C.A. 4), certiorari denied, No. 776, this Term, March 2, 1964. Thus, the district court correctly enjoined continued State support of the Prince Edward School Foundation through tuition grants and tax credits, at least until the public school system was re-established in Prince Edward County.

III

THE APPROPRIATE REMEDY FOR THE ELIMINATION OF THE TERRITORIAL AND RACIAL DISCRIMINATION IS THE REOPENING OF THE PUBLIC SCHOOLS OF PRINCE EDWARD COUNTY

There can be no serious dispute over the propriety of enjoining further support of segregated schools with public funds. At least so long as the public

schools of Prince Edward County remain closed, the State and the county must be prevented from making tuition grants or according tax credits which can only perpetuate racial discrimination in education.

However, a decree so framed will not end the gross discrimination which the petitioners suffer as residents of Prince Edward County: they would still continue to be deprived of the public schools which all other citizens of Virginia enjoy. Plainly, the only adequate remedy is a reopening of the public schools in the county, unless Virginia wishes to withdraw altogether from the provision of education throughout the State. That was the decision of the district court and we think it was clearly correct.

1. The mechanics of the remedy need not detain us long. In our view, Virginia is constitutionally obligated to provide the same public schools for the children of Prince Edward County as it provides elsewhere. Since we deal with a State-regulated system largely supported by State revenues, the duty attaches to the State itself and cannot be shifted to local officials. Accordingly, it might be sufficient to address a decree to the proper State officials requiring them to eliminate the existing discrimination. Indeed, there is little doubt that the State respondents, so enjoined, would find the means to re-open the public schools of Prince Edward County.[35]

[35] While the present parties apparently lack authority to allocate funds for this purpose, it is clear the Virginia General Assembly, without regard to the availability of county tax monies, may appropriate the necessary funds. See *County School Board of Prince Edward County* v. *Griffin*, *supra*, 133 S.E. 2d at 578 (Memo. 31).

But, while we urge the entry of such a general decree, it seems to us appropriate, also, to recognize the scheme of State law which places a part of the financial burden for the operation of the public schools on the county and empowers the local supervisors to levy taxes for that purpose. The discretion they enjoy under present law—improperly delegated, as we think—cannot defeat the petitioners' claim. They are, in this respect, the successors to the State's obligation. But there is no reason to ignore their existence. See *Labile* v. *Watson*, 116 U.S. 289. Thus, the judgment should also compel the Board of Supervisors of Prince Edward County to collect and appropriate the necessary initial funds for school purposes.

2. It is argued, however, that the courts of the United States lack power to grant such "affirmative" relief against the State at the suit of private citizens. The Eleventh Amendment, it is said, stands in the way. Accordingly, we proceed to examine the supposed obstacle.

At the outset, it is clear that neither the Eleventh Amendment nor any other rule prevents a decree against the Board of Supervisors of Prince Edward County. It is well settled that counties do not enjoy the State's immunity from private suits in the federal courts. *Lincoln County* v. *Luning*, 133 U.S. 529; *Cowles* v. *Mercer County*, 7 Wall. 118; *Chicot County* v. *Sherwood*, 148 U.S. 529; *Kennecott Copper Corp.* v. *State Tax Comm.*, 327 U.S. 573, 579.[36] And that

[36] See, also, *Cooper* v. *Westchester County*, 42 F. Supp. 1, 3 (S.D.N.Y.) ("The immunity defined in the 11th Amendment * * * has been held not to extend to counties of a State * * *.");

principle is fully applicable here since a judgment against the Supervisors would reach them alone, without compelling the expenditure of State funds or other State action. Compare *Hopkins* v. *Clemson*, 221 U.S. 630.

Nor is there any inhibition to a form of decree which expressly directs the county authorities to levy necessary taxes. Having plain power to do so (Virginia Constitution, § 136; Va. Code 1950, § 22–126 (1962 Supp.)), the Supervisors may be compelled to assess and collect the needed funds. *Labette County Commissioners* v. *Moulton*, 112 U.S. 217; *Graham* v. *Folsom*, 200 U.S. 248 (1906); *Supervisors* v. *United States*, 4 Wall. 435; *Von Hoffman* v. *City of Quincy*, 4 Wall. 535; *City of Galena* v. *Amy*, 5 Wall. 705; *Riggs* v. *Johnson County*, 6 Wall. 166; *Walkley* v. *City of Muscatine*, 6 Wall. 481; *Cherokee County* v. *Wilson*, 109 U.S. 621. See *Virginia* v. *West Virginia*, 246 U.S. 565, 594.[37] Indeed, a purported withdrawal of the power of taxation would not excuse performance. *Mobile* v. *Watson*, 116 U.S. 289. And, finally, it is no defense that the county supervisors,

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City of Memphis v. *Ingram*, 195 F. 2d 338 (C.A. 8); *Dunnuck* v. *Kansas State Highway Comm.*, 21 F. Supp. 882, 883. (D. Kan.) ("Counties * * * [are] not entitled to the immunity"); *McCreery Engineering Co.* v. *Massachusetts Fan Co.*, 195 Fed. 498, 505 (C.A. 1); Hart & Wechsler, *The Federal Courts & The Federal System* (1953) p. 609.

[37] See, also, *Bush* v. *Orleans Parish School Board*, 190 F. Supp. 861 (E.D. La.), affirmed, 365 U.S. 569, in which the court granted the school board's prayer to compel the City of New Orleans, "as tax collector for the Board * * * to remit to the Board the taxes so collected as required by law." 190 F. Supp. at 866.

as a matter of State law, enjoy a discretion which exempts them from mandamus. See *Griffin* v. *Board of Supervisors of Prince Edward County*, 203 Va. 321, 124 S.E. 2d 227. That contention was set to rest by this Court's decision in *City of Galena* v. *Amy*, 5 Wall. 705. See, also, *Virginia* v. *West Virginia*, *supra*; *Baker* v. *Carr*, 369 U.S. 186, 236.

3. It may well be that the proper State officers, in Richmond and Prince Edward County, will furnish the additional funds and take all other necessary measures to reopen the public schools of Prince Edward once the county supervisors have supplied the initial tax monies for that purpose. But, as we have already noted, the State's obligation, from the constitutional viewpoint, is in no sense dependent on the prior action of the county officials. Accordingly, it is proper that the decree expressly bind the State respondents, the State Board of Education and the State Superintendent of Schools.

Plainly, these officials enjoy no immunity from suit. Insofar as they are enjoined from continuing a discrimination that violates the Fourteenth Amendment, the Eleventh furnishes no shield. That principle was settled by *Ex Parte Young*, 209 U.S. 123, and has been reaffirmed, in this very context, by a host of recent decisions.[38]

[38] *E.g.*, *Bush* v. *Orleans Parish School Board*, 187 F. Supp. 42 (E.D. La.), affirmed, 365 U.S. 569; *Orleans Parish School Board* v. *Bush*, 242 F. 2d 156 (C.A. 5); *School Board* v. *Allen*, 248 F. 2d 59 (C.A. 4), certiorari denied, 353 U.S. 911. The principle is, of course, assumed in this Court's decisions in *Brown* v. *Board of Education*, 347 U.S. 483, 349 U.S. 294, and *Cooper* v. *Aaron*, 358 U.S. 1.

There is nothing in the relief presently sought against these officers which requires a departure from the usual rule. They would be enjoined from expending State funds on a discriminatory basis.[39] That is undeniably an indirect remedy, constrained by the limited powers of the officials joined as defendants.[40] But it is plainly a permissible form of relief, not unlike that often incorporated in the decrees rendered in re-apportionment cases. See, *e.g.*, *Sims* v. *Frink*, 208 F. Supp. 431 (M.D. Ala.), pending on appeal *sub nom. Reynolds* v. *Sims*, Nos. 23, 27, 41, this Term; *Sincock* v. *Duffy*, 215 F. Supp. 169 (D. Del.), pending on appeal *sub nom. Roman* v. *Sincock*, No. 307, this Term. We reliably assume that Virginia will find a practical means to end what her Chief Justice characterized as a "shameful distinction."[41] See *County School Board of Prince Edward County* v. *Griffin*, *supra*, 133 S.E. 2d at 582 (Memo. 40) (Eggleston, C. J., dissenting).

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be reversed and the

[39] The operation of the public schools of Virginia depends on the receipt of State funds advanced by the State Comptroller. These funds are paid out by the Comptroller only after the State Board of Education approves and the State Superintendent of Schools certifies to him that the recipient school districts are eligible under State law to receive the money. See Va. Code 1950, §§ 22–140.

[40] Compare *Aaron* v. *McKinley*, *supra*; *James* v. *Almond*, *supra*; and *James* v. *Duckworth*, *supra*, where the appropriate officials were enjoined from continuing to withhold funds from the closed schools.

[41] The Governor of Virginia has publicly stated that *the State* will comply with any ruling rendered by this Court.

cause remanded to the district court for the entry of a decree in accordance with the suggestions outlined above.

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APPENDIX

Virginia School Laws

Inasmuch as the history and interpretation of the constitution and laws of the State of Virginia have played a significant part in the deliberations of the various courts which have considered this case or some phase thereof, it seems pertinent here to discuss certain of these constitutional provisions and laws.

1. The Supreme Court of Virginia has observed that the public school system in Virginia has been in existence for about 100 years.[1] *Board of Supervisors of Chesterfield County, et al.* v. *County School Board of Chesterfield County,* 182 Va. 266, 28 S.E. 2d 698. The court there recounted the early history as follows (182 Va. at 268–269, 275):

> Under the Code of 1849 a public free school system was allowed to be set up in each county after a vote of the people and when two-thirds of the voters had voted in favor of such a system. The School Commissioners were elected by the people and were to be a body corporate and should have 'general control of school funds and schools.'
>
> They were required to report to the County Court the amount deemed necessary, and the Court was to lay a levy to provide the amount requested.

[1] Actually, the history of public education in Virginia goes back to January 1, 1797, the effective date of "An Act to establish Public Schools" passed on December 22, 1796. This Act authorized the elected aldermen of each county to build a school house and provide three years of tuition gratis for each child, the funds to be derived from county taxes.

> The system set up under the Code of 1849 remained substantially in effect till the law was materially changed by the legislature of 1869–70. At this time a truly public school system was established.
>
> * * * * *
>
> Throughout the history of the public school system in Virginia, the authority to lay local taxes for schools has been placed first in the county court and then in its successor, the board of supervisors. Except for the raising of local taxes for schools, both historically and under our present laws, the boards of supervisors are not charged by law with the establishment, maintenance and operation of the public school system.
>
> From the beginning the school boards have been made bodies corporate. They have been given the responsibility by law of establishing, maintaining and operating the school system, along with the State Board of Education, Superintendent of Public Instruction and the Division Superintendent of Schools.

A constitution subsequently adopted in 1869, in compliance with the conditions laid down for the admission of Virginia to representation in the Congress of the United States, provided that

> SEC. 3. The general assembly shall provide by law, at its first session under this constitution, a uniform system of public free schools, and for its gradual, equal, and full introduction into all of counties of the state by the year 1876, or as much earlier as practicable.

On January 26, 1870, the President approved an act passed by the Congress of the United States admitting the State of Virginia to representation in the Congress and approving the aforesaid constitution, upon the following restrictions and conditions, among others:

> Third. That the constitution of Virginia shall never be so amended or changed as to deprive any citizen or class of citizens of the United States, of the school rights and privileges secured by the constitution of said State.

The General Assembly responded promptly to the constitutional directive in the Acts 1869–70, c. 259, § 67, p. 417, so that the third edition of the Virginia Code, published in 1873, contains chapter LXXVIII, "Of Public Free Schools for Counties, and of the Literary Fund," section one of which states "there shall be established and maintained in this state a uniform system of public free schools." Funds for the establishment, support and maintenance of public free schools were derived from both State and county sources (sections 66–67) and although section 57 prohibited payment of State funds for any school which was not open for at least five months during the year, it also provided that in case of "unavoidable discontinuance" of a school short of the minimum period the board of education could relax the requirement and decide the case on its merits.

2. The voters of the State of Virginia adopted a new constitution in 1902, Article IX, section 129 of which reiterated that "the General Assembly shall establish and maintain an efficient system of public free schools throughout the State." Section 135 of the Constitution commands the Assembly to "apply" certain monies for educational purposes. And Va. Code 1950 § 22–116 declares that the funds "applicable * * * to the establishment, support and maintenance of public schools in the Commonwealth shall consist of" State funds derived from interest on the Literary Fund, General Assembly appropriations, a portion of the Constitutional Capitation tax, other State taxes, and local funds appropriated by local

governmental units. See also Va. Code 1950 § 22–119; 22–119.1 (as amended 1952). These State monies are apparently paid over to local school systems automatically when certain conditions are met. See Va. Code 1950, as amended, § 22–117. Va. Code 1950 § 22–2 provides that "The public free school system shall be administered by a State Board of Education, * * * a Superintendent of Public Instruction, division superintendents of schools, and county and city school boards."[2]

The State Board of Education is responsible for dividing the State "into appropriate school divisions," Va. Code 1950 § 22–30, and for prescribing the qualifications for division superintendents, Va. Code 1950 § 22–31, who are to be appointed by the local school boards, Va. Code 1950 § 22–32, from a list of eligible persons certified by the State Board, Va. Code 1950, as amended (1962 Supp.) § 22–32, and who receive a salary not less than a minimum set by State law, Va. Code 1950, as amended (1962 Supp.), of which amount "the State shall contribute sixty percent, * * *." *Ibid.*

The State Board also prescribes rules and regulations governing the conduct of high schools, as well as requirements for admission, and the conditions on which properly prepared pupils may attend such schools. Va. Code 1950 § 22–191. It examines (Va.

[2] While under Va. Code 1950 § 22-5 the county school boards are merely "empowered" to "maintain the public free schools" of the counties, under Va. Code 1950 § 22-21 the State Board of Education is "authorized and required to do all things necessary to stimulate and encourage local supervisory activities and interest in the improvement of the elementary and secondary schools * * *." The Board of Education, the Superintendent of Public Instruction, and the local school boards were held to be state agencies in *County School Board of Prince Edward* v. *Griffin*, — Va. —, 133 S.E. 2d 565, 577.

Code § 22–202) and certifies teachers (Va. Code 1950 § 22–204);[3] it "is authorized and directed to adopt rules and regulations governing the purchase of textbooks, adopted by it for use in the public schools * * *," (Va. Code 1950 § 22–295); and it shall select textbooks * * * for use in the public schools of the State, exercising such discretion as it may see fit in the selection of books suitable for the schools in the cities and counties respectively." Va. Code 1950 § 22–296. See also, generally, Va. Code 1950 (1962 Supp. § 22–146.1 *et seq.*; 22.166.1 *et seq.*

The Superintendent of Public Instruction is appointed by the Governor, Va. Code 1950 § 22–22, and is charged with formulating "such rules and regulations," and providing "such assistance * * * as shall be necessary for the proper and uniform enforcement of the provisions of the school law in cooperation with the local school authorities." Va Code 1950 § 22–25.

In addition to all this, local school boards are regulated to a great extent by State law (see Va. Code 1950 § 22–45 *et seq.*), including salary limitations for local board members (Va. Code 1950 § 22–67.2). State law specifies what subjects shall be taught in the elementary grades. Va. Code 1950 § 22–233 to 22–238.

3. Following the May 17, 1954, decision of this Court in *Brown* v. *Board of Education*, 347 U.S. 483, the Supreme Court of Virginia considered the validity of an item in the Appropriation Act of 1954 (Item 210, Acts of Assembly 1954, ch. 708, p. 970) making available money for orphans of war veterans to pay their tuition and other school expenses at any approved educational or training institution of col-

[3] Subject to some exceptions, local school boards may employ as teachers only persons certified by the State Board. Va. Code 1950 § 22–204.

legiate or secondary grade in the State of Virginia.[4] Section 141 of the Virginia Constitution at that time provided that "no appropriation of public funds shall be made to any school or institution of learning not owned or exclusively controlled by the State or some political subdivision thereof." The decision of the Supreme Court of Virginia, handed down on November 7, 1955, is reported as *Almond* v. *Day*, 197 Va. 419, 89 S.E. 2d 851 and it was there held (197 Va. at 424, 427, 428, 431):

> Section 141 is found in Article IX of our Constitution embracing the provisions for "Education and Public Instruction." Section 129, the first of these provisions, provides that "The General Assembly shall establish and maintain an efficient system of public free schools throughout the State." The other sections in Article IX make provision for the establishment and maintenance of such system. Among these is Section 141 which insures that public funds raised by taxation will be under the exclusive control of public authorities, used for the benefit of the public schools, and that no part thereof will be diverted from that purpose to private schools.
>
> * * * * *
>
> * * * Assuming, but not deciding, the soundness of the view that the private institutions involved receive no direct benefit from the transportation of pupils or the furnishing of textbooks to them, the same cannot be said of provisions for the payment of tuition and insti-

[4] This was the outgrowth of a 1930 Act providing for the payment of certain expenses (not including tuition) of war orphans at state institutions. The Appropriation Act of 1932 (Acts 1932, ch. 147, p. 193) broadened this to any approved educational institution in the state and the 1950 Appropriation Act (Acts 1950, ch. 578, p. 1377) enlarged it to provide also for the payment of tuition.

tutional fees at such schools. Tuition and institutional fees go directly to the institution and are its very life blood. Such items are the main support of private schools which are not sufficiently endowed to insure their maintenance. Surely a payment by the State of the tuition and fees of the pupils of a private school begun on the strength of a contract by the State to do so would be an appropriation to that school.

* * * * *

When we consider the natural, reasonable and realistic effect of the provision in Item 210 for the payment of tuition, institutional fees and other designated expenses of eligible children who attend private schools approved by the Superintendent of Public Instruction, we are forced to the conclusion that it constitutes a direct and substantial aid to such institutions and falls within the prohibition of Section 141 of our Constitution.

We further agree with the position of counsel for the respondent State Comptroller that in so far as Item 210 purports to authorize payments for tuition, institutional fees and other designated expenses of eligible children who attend *sectarian* schools, it falls within the prohibitions of Sections 16, 58 and 67 of the Constitution of Virginia and the First and Fourteenth Amendments to the Federal Constitution.

* * * * *

To sustain the validity of Item 210, in so far as it purports to authorize payments for tuition, institutional fees and other designated expenses of eligible children who attend private schools, in the face of the constitutional provisions which have been discussed, would mean that by like appropriations the General Assembly might divert public funds to the support of a system of private schools which the Constitution now forbids. If that be a desir-

able end, it should be accomplished by amending our Constitution in the manner therein provided.

4. On March 7, 1956, section 141 of the Virginia Constitution was amended by adding to it the following proviso:

> * * * provided, first, that the General Assembly may, and the governing bodies of the several counties, cities and towns may, subject to such limitations as may be imposed by the General Assembly, appropriate funds for educational purposes which may be expended in furtherance of elementary, secondary, collegiate or graduate education of Virginia students in public and nonsectarian private schools and institutions of learning, in addition to those owned or exclusively controlled by the State or any such county, city or town.

5. That same year, 1956, the General Assembly of Virginia met in extra session and enacted several statutes which were subsequently described by the Supreme Court of Virginia in *Harrison* v. *Day*, 200 Va. 439, 106 S.E. 2d 636, in these terms (200 Va. at 442–443):[5]

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[5] Other related legislation passed at the 1956 Extra Session but not mentioned by the court in *Harrison* included an amendment to the Virginia Supplement Retirement Act (Code of Va. (1950 ed.) 51–111.9 *et seq.* (1962 Supp.)) so as to include within its retirement benefits, theretofore restricted to public school teachers and other state employees, teachers in private elementary and secondary schools incorporated after December 29, 1956. Code of Va. (1950 ed.) 51–111.38 (1962 Supp.). Teachers who formerly taught in public schools retain their benefits accrued during such public school service. Code of Va. (1950 ed.) 51–111.41 (1962 Supp.). In the 1956 extra session the legislature also repealed section 125 of title 22, which permitted 20% of the qualified voters to petition for election when the board of supervisors refused to make a levy requested by the school board, to determine whether a levy in lieu

> It will be observed that the stated purpose of the plan embodied in these acts is to prevent the enrollment and instruction of white and colored children in the same public schools. To that end, all elementary and secondary public schools in which both white and colored children are enrolled are, upon the happening of that event, automatically closed, removed from the public school system, and placed under the control of the Governor. All State appropriations for the support and maintenance of such schools are cut off and withheld from them. Such State funds so withheld, and certain other funds raised by local levies, are to be used for the payment of tuition grants for the education in nonsectarian private schools of children who have been attending such public schools, who cannot be assigned to other public schools, and whose parents or custodians desire that they do not attend schools in which both white and colored children are enrolled and taught. Schools which may be policed under federal authority, or disturbed by such policing, are, upon the happening of that event, likewise automatically closed, and under related statutes, tuition grants are made available for pupils who have been attending such schools.

In *Harrison* v. *Day, supra,* decided January 19, 1959, the court invalidated the 1956 legislation, holding (200 Va. at 450–451, 452–453):

> Clearly, the language of Section 141, as amended, contemplates that if State funds are to be devoted to the education of Virginia students in nonsectarian private schools, the General Assembly should make the necessary ap-

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of that authorized should be made; and section 126 of title 22 was amended so that a school tax of less than 50 cents per 100 dollars of the assessed value of property could be levied by the board of supervisors (previously there was a minimum levy of 50 cents per 100 dollars).

propriation therefor. The purposes of Section 141 may not be accomplished at the expense of some public free schools by withholding State funds from their support, and devoting such funds to the payment of tuition grants, as is attempted under the provisions of the Appropriation Act of 1958. (Acts 1958, ch. 642, p. 989).

This device leaves such schools from which the supporting funds are withheld and diverted entirely without the State support required by Section 129 of the Constitution. That section requires the State to "*maintain* an efficient system of public free schools *throughout the State.*" (Emphasis added.) That means that the State must support such public free schools in the State as are necessary to an efficient system, including those in which the pupils of both races are compelled to be enrolled and taught together, however unfortunate that situation may be.

It follows, then, that the provisions of the Act of 1956, Ex. Sess., ch. 68, p. 69 (Code, 1958 Cum. Supp. § 22–188.3 ff.), and the provisions of the Appropriation Act of 1958, ch. 642, p. 989, violate Section 129 of the Constitution in that they remove from the public school system any schools in which pupils of the two races are mixed, and make no provision for their support and maintenance as a part of the system.

It is argued that the closing of schools under these provisions is merely temporary. But the acts do not so provide, and the fact that provision is attempted to be made for the education in private schools of children who have been attending these interrupted schools indicates that the condition may be prolonged. Indeed, it is a matter of common knowledge that under the provisions of these acts a number of schools in several localities in the State have been closed for months.

* * * * *

We find no constitutional objection to the prescribed procedure for making tuition grants out of funds properly available for the purpose. Section 141 of the Constitution, as amended, authorizing State and local appropriations for this purpose places no restriction on the manner in which this is to be done, thus leaving it to the discretion of the General Assembly.

6. The General Assembly met in extra session beginning January 28, 1959, in an apparent effort to salvage what remained of the 1956 "plan." Chapter 1, H.B. 2, was passed on January 31, 1959, amending certain of the 1956 statutes. The most significant of these changes was made in 22–115.12, which was changed to provide that payments of tuition grants shall be made "to parents, guardians, or other custodians of children whose parents, guardians, or custodians make affidavit, and establish to the satisfaction of the local school board, that there is no adequate public school available for the child to attend, or that the welfare of the child would be best served if he attended a school other than the public school at which he would normally attend, or that the child, his parents, guardian or custodian object upon grounds deemed valid and reasonable by the local school board to such child's attendance at the public school to which he has been or normally would be assigned." Other changes were of an administrative nature and the only one of any significance permitted the tuition grant money to be used for children being educated in public schools of other localities. 22–115.15, which provided that "payments for grants under the provisions of this statute should be considered in the distribution of State funds allocated and proportioned for such purposes as though such expenditures were made by the locality for operation and maintenance of the public schools," was repealed.

7. Subsequently, the Perrow Commission delivered its report calling for the complete repeal of the massive resistance legislation and introducing a plan based on "freedom of choice" scholarships to permit private nonsectarian schools to operate in addition to and in place of the public schools. In response, the General Assembly in April 1959 enacted a new tuition grant scheme, repealing the remainder of the 1956 legislation and also repealing H.R. 2 passed on January 31, 1959. Inasmuch as the 1959 tuition grant scheme was replaced by another similar scheme in 1960, described below in the words of the Supreme Court of Virginia in *County School Board of Prince Edward County* v. *Griffin, supra,* there is no purpose here in describing it in detail. Suffice it to say that the 1959 legislation provided a plan of tuition grant "scholarships" for children attending private nonsectarian schools, the money for such scholarships to be derived from both State and local sources but not from funds set aside for public schools. Related legislation passed at the same time in the 1959 Extra Session included repeal of the compulsory attendance laws (Code of Virginia (1950 ed.) 22–251 to 22–275) and their replacement by the same laws on a "local option" basis (*Id.,* 22–275.1 to 22–275.22 (1962 Supp.)); school bus transportation for children attending nonsectarian private schools or financial assistance to the parents of such children in lieu of such transportation (*Id.,* 22–294.1 to 22–294.3 (1962 Supp.)); permitting State teacher education scholarships to be repaid by teaching one year in a nonsectarian private school* (*Id.,* 23–28 (1962 Supp.)); and providing for a referendum to sell school property "no longer

* Formerly such scholarships could be repaid by teaching in a *public* school only.

needed for public purposes" (*Id.*, 22–161.1–161.5 (1962 Supp.)). At this time the General Assembly also amended, added or repealed a number of statutory provisions dealing with the financing of schools so that a local tax-levying body did not have to appropriate money for schools, even if they levied a property tax; local school boards had to prepare two budgets, one for schools, the other for "educational purposes"; and funds derived from a property tax levy could be appropriated for schools or tuition grant "scholarships", or both (Acts, 1959 Ex. Sess., ch. 52, 69, 79 and see Code of Virginia (1950 ed.) 22–117 *et seq.* (1962 Supp.)).

As stated above, the Supreme Court of Virginia has described the present tuition grant plan, enacted at the 1960 session of the General Assembly, in its opinion in *County School Board of Prince Edward County* v. *Griffin, supra,* 133 S.E. 2d at 579, as follows:

> The present tuition grants law was enacted by the General Assembly by Acts 1960, ch. 448, p. 703, now codified as §§ 22–115.29 through 22–115.35. These sections provide for the granting of State and local scholarships without reference to race or creed. Section 22–115.30 provides:
>
> "Every child in this Commonwealth between the ages of six and twenty who has not finished or graduated from high school, and who desires to attend a nonsectarian private school located in or outside, or a public school located outside, the locality in which such child resides, shall be eligible and entitled to receive a State scholarship in the amount of one hundred and twenty-five dollars per school year, if attending an elementary school and one hundred fifty dollars if attending a high school."
>
> Section 22–115.31 authorizes localities to provide local scholarships, for the education of

children residing therein, in nonsectarian private schools located in or outside, and in public schools located outside, the locality.

Section 22–115.32 makes every child between six and twenty years of age residing in the locality who has not finished high school eligible for such local scholarships.

Section 22–115.34 provides that if the locality fails to provide such scholarships, the State Board of Education may direct the Superintendent of Public Instruction to do so, and the amount thereof shall be deducted from other State funds appropriated to such locality, but not from any funds to which the locality is entitled as welfare funds or for the operation of public schools.

We perceive nothing in or out of the statutes to render these scholarships unavailable to any eligible child in Prince Edward county whether public free schools are operated in the county or not.

In that opinion the court also summarized what it described as the sections of the present Virginia Constitution dealing with money and other matters of operation of the public school system (133 S.E. 2d at 574):

Section 134 established the literary fund and it was amended in 1944 to empower the General Assembly to set aside parts thereof above ten million dollars for public school purposes.

Section 135 required the General Assembly to apply to the schools of the primary and grammar grades (generally accepted as meaning the grades below high school) the constitutional minimum funds above referred to. It then permitted the General Assembly to make such other appropriations for school purposes "as it may deem best."

Then § 136 authorized each school district to raise additional sums by a tax on property, to be apportioned and expended by the local school

authority *"in establishing and maintaining such schools as in their judgment the public welfare may require* (emphasis added);" provided that the primary schools so established must be maintained at least four months before any of the money can be used to establish schools of higher grade.

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No. 592

Supreme Court of the United States

October Term, 1963

COCHEYSE J. GRIFFIN, ETC., ET AL.,
Petitioners,

v.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, ET AL.,
Respondents.

On Writ Of Certiorari To The United States Court of Appeals For The Fourth Circuit

MEMORANDUM ON BEHALF OF RESPONDENTS IN REPLY TO THE SUPPLEMENTAL MEMORANDUM OF THE UNITED STATES AS AMICUS CURIAE

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MEMORANDUM ON BEHALF OF RESPONDENTS IN REPLY TO THE SUPPLEMENTAL MEMORANDUM OF THE UNITED STATES AS AMICUS CURIAE

PRELIMINARY STATEMENT

During oral argument of this case on March 30, 1964, the Solicitor General of the United States requested permission of the Chief Justice to file a supplemental memorandum of authorities on behalf of the United States as *amicus curiae*. Permission was granted by the Chief Justice, and leave to reply to the proposed memorandum was simultaneously accorded respondents. Pursuant to the leave thus conferred, the instant memorandum of respondents in reply to the supplemental memorandum of the United States is filed.

ARGUMENT

I.

In his supplemental memorandum the Solicitor General advances two separate considerations which are alleged to support the conclusion that a District Court of three judges was not required in the case at bar.

Initially, the Solicitor General suggests that the "thrust of the present action" is not to restrain the enforcement, operation or execution of a State statute, but merely to restrain a "course of executive or administrative action" entered upon by the respondents without sanction of State law. See, Supplemental Memorandum for the United States, p. 2.

As illustrative of the stated suggestion, the Solicitor General makes reference to the decisions of this Court in *Ex Parte Bransford*, 310 U. S. 354, and *Phillips* v. *United States*, 312 U. S. 246. The former case involved collateral proceedings in a suit by a bank to enjoin the collection of certain taxes by local officials upon the ground, *inter alia*, that the assessments underlying the challenged taxes were *unauthorized* by Arizona law. This Court held that a three-judge District Court was not required to consider such a complaint because the "validity of the statute itself is not involved" and the challenged assessments, if erroneous, were "so because of a wrong done by officers under the statute rather than because of the requirement of the statute itself." *Id.* at 359. Similarly, in the latter case, suit was instituted by the United States to restrain the Governor of Oklahoma from a course of conduct alleged to be *unauthorized* by law. There, the Court also held that a three-judge District Court was not required because the suit involved only an attack upon a "lawless exercise of authority" and not "an attack upon the constitutionality of the statute" conferring the authority. *Id.* at 252. In support of its position, the Court

pointed out that the complaint of the United States "assailed merely the Governor's action as exceeding the bounds of law." *Id.* at 252.

It is difficult for respondents to conceive how it may even be intimated that these decisions have any relevance whatever to the situation presented in the case at bar. *Bransford* and *Phillips* could be relevant to the instant case *only if* a claim could be made that the challenged conduct of the present respondents was *unauthorized* by Virginia law. Of course, no such claim can possibly be made in the instant case, for the decision of the Supreme Court of Appeals of Virginia in *School Board* v. *Griffin*, 204 Va. 650, 133 S.E. (2d) 565, conclusively establishes that every aspect of the activity of the respondents is fully authorized by Virginia law and has been taken in complete conformity with the constitutional and statutory provisions of Virginia law authorizing such conduct.

However, *Bransford* and *Phillips* do contain language which is applicable to the instant situation. Thus, in *Bransford, supra*, at 361, the Court pointed out:

> "It is necessary to distinguish between a petition for injunction on the ground of the unconstitutionality of a statute as applied, which requires a three-judge court, and a petition which seeks an injunction on the ground of the unconstitutionality of the result obtained by the use of a statute which is not attacked as unconstitutional. The latter petition does not require a three-judge court. *In such a case the attack is aimed at an allegedly erroneous administrative action.* . . . Where by an omission to attack the constitutionality of a state statute, *its validity is admitted for the purposes of the bill*, a determination by the trial court that *the assessment accords with the statute would result in the refusal of the injunction and the dismissal of the bill.*" (Italics supplied)

Applying the above-quoted observation to the case at bar, it necessarily follows that if the amended supplemental complaint fails to attack the constitutionality of the relevant provisions of Virginia law, a determination by the trial court that the conduct of respondents "accords with" Virginia law would necessarily entail a refusal of the requested injunction and the dismissal of the amended supplemental complaint. Of course, a determination by the trial court that the conduct of the respondents *does* accord with Virginia law is the only determination which the trial court could make, for this question of State law has been laid to rest in conclusive fashion by *School Board* v. *Griffin, supra*, a decision which is absolutely binding on the District Court.

Moreover, in *Phillips, supra*, at 251, this Court declared that activation of the three-judge District Court statute:

> "... requires a suit which seeks to *interpose the Constitution against enforcement of a state policy, whether such policy is defined in a state constitution or in an ordinary statute* or through the delegated legislation of an 'administrative board or commission.' The crux of the business is procedural protection against an improvident *state-wide doom by a federal court of a state's legislative policy.*" (Italics supplied)

This, of course, is precisely what the Solicitor General asserts is the "primary challenge" in the case at bar. See, Supplemental Memorandum for the United States, p. 3. Petitioners seek to interpose the Fourteenth Amendment to the Constitution of the United States against the enforcement, operation and execution of the long standing State policy of Virginia with respect to the "local option" operation of public schools, which policy has for generations been expressed in the constitutional and implementing statutory provisions of Virginia law. The amended supplemental com-

plaint clearly and aggressively calls for the "state-wide doom by a federal court" of Virginia's legislative policy permitting such local option in the operation of public schools. Manifestly—under the very decisions cited by the Solicitor General—the granting of such relief requires convocation of a three-judge District Court.

So far as the Virginia tuition grant statute is concerned, the Solicitor General acknowledges that the relief requested by the amended supplemental complaint in this respect involves a "challenge to the constitutionality of the State law providing for the payment" of such grants, and the Solicitor General admits that *only* "a three-judge court could grant or deny" the State-wide relief requested in the amended supplemental complaint. See, Supplemental Memorandum for the United States, p. 3. This, of course, is precisely the position which respondents have taken since the amended supplemental complaint was filed, which position was quite naturally taken on the basis of, and in response to, the claims set up and the relief requested in the amended supplemental complaint.

It is now asserted that petitioners have "abandoned any broad attack on the Virginia tuition grant statute" and have confined themselves—as has the United States—to seeking relief on narrower grounds not requiring convocation of a three-judge District Court. Respondents, of course, have not been advised of the nature of the narrower claim or of the legal basis upon which such claim is predicted. Certainly, the reduced claim cannot be positioned upon the basis assigned by the District Court—*i.e.*, that the Virginia tuition grant statute does not authorize the payment of grants to persons residing in localities where no public schools are operated— for this obvious misconstruction of State law by the District Court has been conclusively removed from the

realm of possible utilization by the decision of the Virginia Supreme Court in *School Board* v. *Griffin, supra*. If some other legal basis for the narrower claim exists, it has not been asserted by petitioners or the United States in any prior stage of these proceedings, and certainly "due process of law" would require that respondents be informed of this legal contention and afforded an opportunity to consider and defend against it.

Secondly, the Solicitor General suggests that a District Court of three judges is not required in the case at bar because "the present suit is directly primarily against local officials and involves a matter of only local immediate concern." See, Supplemental Memorandum for the United States, 4. Surely, this is an astounding assertion for anyone even remotely connected with this litigation to make. In view of the record in this case, the assertion is utterly inconceivable. The *State* Board of Education of the *Commonwealth of Virginia* and the Superintendent of Public Instruction of the *Commonwealth of Virginia* were expressly made parties defendant to this suit by the amended supplemental complaint, such State officers are sought to be covered by every injunction now requested in the prayers for relief which are still active in this case and such State officials are even now—and for the past two years have been—restrained by the injunction entered by the District Court prohibiting the payment of tuition grants to residents of Prince Edward County.

Only a casual reading of the cases cited by the Solicitor General in this portion of his supplemental memorandum is required to demonstrate their irrelevance to the situation presented in the case at bar. The inapplicability of *Ex Parte Collins*, 277 U. S. 565, is most easily exposed by reference to the factual complex described by the Court in the following language (277 U. S. at 567-569):

"The defendants in the suit are the *city of Phoenix*, Arizona, and Schmidt-Hitchcock, contractors, *a private Arizona corporation*. The purpose of the suit is to enjoin *the city, its officers, and the contractor*, from proceeding under a *resolution adopted by the city* directing the paving of a street on which the petitioner is an abutting owner.

* * *

"Schmidt-Hitchcock objected to the calling of additional judges on the ground that the case did not fall within the purview of § 266, but was merely one in which it was sought to prevent *a municipal corporation and its officers from proceeding with a municipal improvement*.

"The suit is not one to restrain 'the enforcement, operation, or execution' of a statute of a state within the meaning of § 266.

* * *

"Thus, the section has long been held inapplicable to suits seeking to enjoin the execution of *municipal ordinances, or the orders of a city board*.

* * *

"Moreover, the enabling act is not itself being enforced within the meaning of § 266. That act merely authorizes further legislative action to be taken by the city, as by the resolution here in question. *It is that municipal action, not the statute of a state*, whose 'enforcement, operation, or execution' the petitioner seeks to enjoin." (Italics supplied)

Moreover, in *Rorick* v. *Everglades Drainage Dist.*, 307 U. S. 208, the statutes there under attack constituted local or special legislation applicable only to the Everglades Drainage District. Such statutes were not of "general application" throughout the State of Florida, but affected "exclusively a particular district of Florida." *Id.* at 212. Finally, in *Wilentz* v. *Sovereign Camp. W.O.W.*, 306 U. S. 573, the State of-

ficials there involved were designated by this Court as "nominal parties" whose "presence is not required to prevent the operation" of the statute there challenged. Indeed, this Court pointed out that the trial court's decree "enjoined no action" by State officials. *Id.* at 579.

Surely, no one can seriously suggest that the Virginia tuition grant statute is not a statute of general application, or that it is one which is applicable to and affects only a particular locality or district of Virginia. On the contrary, it is perfectly clear that such statute applies to every political subdivision (and every child of school age residing therein) from the Eastern Shore to the Kentucky border, from the District of Columbia to the North Carolina line. Moreover, no one can seriously suggest that the State Board of Education or Superintendent of Public Instruction are merely "nominal parties" whose presence is not required to grant the requested relief. As previously pointed out and as the injunction of the District Court confirms, these State officials are indispensably necessary parties whose activities must be enjoined if the enforcement, operation or execution of the statute in question is to be restrained.

In light of the foregoing, counsel for the respondents submit that neither of the considerations suggested by the Solicitor General supports the conclusion that a three-judge District Court was not required in the case at bar. On the contrary, the necessity for convocation of such a tribunal is as fully apparent now as it has been at all times during the course of this litigation.

NOTE: Since completion of our memorandum argument in response to the supplemental memorandum of the Solicitor General with respect to the necessity of convening a three-judge District Court in the case at bar, respondents have received the Supplemental Memorandum for Petitioners dis-

cussing this aspect of the instant litigation. Essentially, it is the position of the petitioners that they do not challenge the constitutionality of the Virginia tuition grant statute *on its face*, but only as the statute is *applied* in the instant case. In this connection, on page 2 of their supplemental memorandum, petitioners assert that:

> ". . . since this attack does not bring into question the constitutionality of the statute *on its face but only in respect to its application*, the convening of a three judge statutory district court is not a jurisdictional prerequisite." (Italics supplied)

In response to this assertion, respondents submit that petitioners' reliance upon the purported distinction is entirely misplaced. An injunctive suit attacking the constitutional validity of a statute *as applied* is one which requires a three-judge court equally as much as one which attacks the constitutional validity of a statute on its face. This very point was expressly made in the principal decision relied upon by petitioners, *Ex Parte Bransford, supra*, at 361, in which this Court pointed out:

> "If is necessary to distinguish between a petition for injunction on the ground of the unconstitutionality of a statute *as applied, which requires a three-judge court*, and a petition which seeks an injunction on the ground of the unconstitutionality of the result obtained by the use of a statute which is not attacked as unconstitutional." (Italics supplied)

To precisely the same effect is the language of this Court in the recent case of *Idlewild Liquor Corp.* v. *Epstein*, 370 U. S. 713, 714, in which this Court held that a three-judge court should have been convened to hear a complaint which:

> ". . . asked for a judgment declaring that the state statutes, ***as applied***, were repugnant to the Commerce Clause, the Export-Import Clause, and the Supremacy Clause of the United States Constitution, and for an injunction restraining the State Liquor Authority from interfering with the ***petitioner's business.***" (Italics supplied)

Similarly, in the leading case of *Stratton* v. *St. Louis S. W. R. Co.*, 282 U. S. 10, 12, this Court also held that a three-judge District Court was required to hear a suit brought by the railroad company:

> ". . . to restrain the enforcement of a statute of the State of Illinois (General Corporation Act, § 107), providing for the payment of a minimum franchise tax, upon the ground that the statute ***as applied to the complainant*** violated the commerce clause, and the due process and equal protection clauses, of the Federal Constitution." (Italics supplied)

See also, *Query* v. *United States*, 316 U. S. 468; *Kesler* v. *Department of Public Safety*, 369 U. S. 153. In light of the consistent language of this Court in the above-quoted decisions, it is unarguably apparent that a three-judge District Court is required to hear an injunctive complaint involving the constitutionality of a statute ***as applied***, as well as one involving the constitutionality of a statute on its face.

II.

In that portion of his supplemental memorandum designated "Other authorities," the Solicitor General submits that "in the eyes of the Constitution, the conduct of the several respondents, however independently each of them may have acted, is viewed as a whole and is attributed to the State of

Virginia." The apparent purpose of this assertion is to establish the proposition that all public officials of Virginia are amenable to the Fourteenth Amendment under the "State action" concept, including local officials of Prince Edward County. Of course, respondents have never asserted, or attempted to assert, that local public officials are immune to the prohibitions of the Fourteenth Amendment or that their action, if unconstitutional, may not be properly restrained. In this connection, neither *Iowa-Des Moines Bank* v. *Bennett*, 284 U. S. 239, nor *Labette County Commissioners* v. *United States ex rel Moulton*, 112 U. S. 217, cited by the Solicitor General, involved a suit to challenge the constitutional validity of a local option law or to compel affirmative action on the part of State officials or to enjoin action by State officials in the enforcement, operation or execution of a State law.

The source of the Solicitor General's dilemma in the present case is not difficult to ascertain. For purposes of the Fourteenth Amendment, the Solicitor General attempts to attribute the independent actions of all of the respondents (State and local) to the State of Virginia; however, when faced with the jurisdictional barrier of the Eleventh Amendment or the fatal bar of the three-judge court requirement, he conveniently forgets that the instant suit seeks to require affirmative action on the part of State officials and to enjoin State officials from the enforcement of the Virginia tuition grant statute, and he then asserts that "the present suit is directed primarily" against local officials.

Counsel for the respondents respectfully submit that the Solicitor General cannot have it both ways. If the State Board of Education of the Commonwealth of Virginia and the Superintendent of Public Instruction of the Commonwealth of Virginia are—in fact and in law—State officials

(as, of course, they indisputably are), the Solicitor General cannot transform them into "local officials" by the mere manipulation of labels to suit his purpose of the moment.

Nor can the Solicitor General escape the prohibition of the Eleventh Amendment by the untenable suggestion that the relief sought in this case is essentially negative in character. This suggestion is clearly demolished by the Solicitor General's own revealing statement that the primary relief sought in the instant case is that "requiring reopening of the public schools." See, Supplemental Memorandum for the United States, p. 4. By no stretch of the imagination can it be said that a suit which seeks to require officials of the Commonwealth of Virginia to open and operate public schools and to expend for this purpose monies which have not been appropriated by the General Assembly is one which seeks essentially negative relief.

The Department of Justice understood the true nature of this case and of the relief sought herein when it attempted in May, 1961, to gain admission of the United States as a party in this litigation. At that time the Attorney General of the United States declared in his Motion to Intervene as a Plaintiff that intervention by the United States "is necessary," and in support of that assertion said in his Memorandum of Law filed in the District Court:

> "The representation of the interest of the United States by the plaintiffs is plainly inadequate. The United States, by its complaint in intervention, has joined the State of Virginia in order to secure complete relief in this action, in which the United States contends that the State is circumventing this Court's order by action which is unlawful in that it denies to the residents of Prince Edward County the equal protection of the laws. *But the State of Virginia can be made a defendant only by the United States, since the Eleventh Amendment*

> *of the United States Constitution bars the plaintiffs from suing a State without its consent.*" (Italics supplied) (*Allen* v. *County Board, etc.*, 28 F. R. D. 358, 361)

Thus we see that in 1961 the Justice Department understood full well that the relief sought herein is in fact relief against the State and that the relief sought is of such nature as to fall within the scope of the Eleventh Amendment. The validity of the proposition italicized above and set forth by the Department of Justice in 1961 is clearly indicated by the inability of the Solicitor General to cite any decision other than *Ex Parte Young*, 209 U. S. 123, in support of the diametrically opposite position now asserted by the Department of Justice. *Ex Parte Young*, of course, is a classic example of a suit to enjoin a State officer from taking action to enforce a State law (Minnesota rate statute) and sought merely the cessation of activity under such statute. No affirmative action on the part of any State official was requested. Manifestly, the decision in that case, with which each member of this Court is thoroughly familiar, is utterly foreign to the situation or issues presented in the case at bar.

In support of his attack upon the local option character of the Virginia laws relating to the operation of public schools, the Solicitor General suggests that a State may not constitutionally enact a statute which permits certain of its political subdivisions to operate public schools, while denying the same opportunity to other political subdivisions. On the basis of this premise, he then suggests that since the State legislature may not make such a selection itself, it may not refer the decision to each political subdivision to be determined on the basis of local option. This, of course, is a palpable *non-sequitur*. Even assuming the validity of the

Solicitor General's premise that the State legislature may not itself make such a selection (a premise of doubtful validity under *Salsburg* v. *Maryland*, 346 U. S. 545), it does not at all follow that individual political subdivisions themselves may not be permitted to exercise their discretion under an unrestricted local option law. Assuming, *arguendo*, that the United States may not constitutionally make the National Defense Education Act applicable only to some States and not to others, it does not follow that if that Act is applicable to all States, some States may not elect to participate in the benefits of the Act while others decline to do so. Similarly, in the case at bar, even assuming that the General Assembly of Virginia may not constitutionally provide that all other political subdivisions of the Commonwealth with the exception of Prince Edward County, the City of Fairfax and the City of Franklin may operate public schools, it does not follow that the named political subdivisions may not independently decline to operate public schools under a local option law applicable throughout the State. The heart of the matter is that neither the Solicitor General nor the petitioners have cited one decision of this Court in which a local option statute has been invalidated under the Fourteenth Amendment.

The Supplemental Memorandum filed by the Solicitor General ends with the citation of two cases which are said, by him, to rebut "the allegation that every decision compelling local officers to appropriate public money at the suit of private parties in the courts of the United States involved the enforcement of a *contractual* obligation voluntarily assumed by the locality." We repeat our allegation that such was true in every such case cited by the Solicitor General in Note 36, pages 37 and 38, of his brief and further we insist that the two cases now cited, *Hopkins* v. *Clemson Col-*

lege, 221 U. S. 636, and *Commissioners* v. *United States*, 100 F. (2d) 929, 308 U. S. 343, do not remotely contradict our prior assertion.

In the *Clemson College* case the plaintiff sued a State college for damages to his farm resulting from the construction of a dyke by the college. By no amount of warping can it be construed as a decision that this Court can compel a State or its political subdivisions to levy a tax; to the contrary, we find no discussion of such issue in the case, but rather the Court points to sources out of which a judgment against the college could be paid "besides the states annual appropriation."

The *Clemson College* case is far more pertinent here for a statement made by the Court in considering its jurisdiction against a claim of Eleventh Amendment immunity:

> "And looking through form to substance, the 11th Amendment has been held to apply, not only where the State is actually named as a party defendant on the record, but where the proceeding though nominally against the officer, is really against the State, or is one to which it is an indispensable party. *No suit, therefore, can be maintained against a public officer*, which seeks to compel him to exercise the State's power of taxation or to pay out its money in his possession on the State's obligations, or to execute a contract, or to do any affirmative act which affects the State's political or property rights." (221 U. S. 642) (Emphasis added)

Commissioners v. *United States*, 100 F. (2d) 929, which was modified and affirmed in 308 U. S. 343, was a suit by the United States on behalf of an Indian ward to recover under a State statute taxes assessed and collected against the ward in violation of a treaty exempting his property from State taxes. The lower federal Court held the State's statute

of limitations inapplicable to the United States and awarded judgment for both the taxes and interest. The Supreme Court reversed as to interest which was the only issue appealed. The case has nothing whatsoever to do with requiring a county to levy a tax, nor does it deal with the appropriation of public funds—it merely requires that the County refund money illegally obtained by it. In that case, a sum certain was involved and there had been a legislative determination by the State that taxes illegally collected would be refunded.

Neither case refutes our allegation that the Solicitor General has failed to cite any case in which this Court, or any federal court, has undertaken to burden the citizens of a State or one of its political subdivisions with taxation without representation by exercising in the first instance the purely legislative function of determining that taxes shall be levied for a particular purpose. Such is the action which must be taken here if the Board of Supervisors of Prince Edward County is to be told to levy a tax. The Solicitor General will find no precedent in American jurisprudence because the principle is contrary to a fundamental American concept.

In conclusion, respondents would point out that the case at bar is before this Court on writ of certiorari to review a decision of the United States Court of Appeals for the Fourth Circuit. As stated in the brief filed on behalf of the State Board of Education and Superintendent of Public Instruction, at page 73, respondents submit that the "majority opinion of the Court of Appeals in the case at bar is a fully precedented and thoroughly definitive exposition of the existing law and is absolutely dispositive of the fundamental constitutional issues contrary to the positions of the petitioners."

In this connection, it is not without significance that the Solicitor General and the petitioners have studiously avoided making any reference to any provision of that opinion, or, asserting that any statement therein made is incorrect or is not supported by the numerous decisional authorities cited by the majority jurists. Respondents respectfully submit that if petitioners seek a reversal of the decision of the United States Court of Appeals for the Fourth Circuit upon the ground that such decision incorrectly states the applicable law, then the particulars in which that decision is erroneous should be articulated.

Respectfully submitted,

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PROOF OF SERVICE

I, R. D. McIlwaine, III, one of counsel for the respondents herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 23rd day of April, 1964, I served copies of the within Memorandum On Behalf Of Respondents In Reply To The Supplemental Memorandum Of The United States As Amicus Curiae on the several petitioners herein by mailing same in duly addressed envelopes, with first-class postage prepaid, to their respective addresses of record as follows: Robert L. Carter, 20 West 40th Street, New York, New York, and S. W. Tucker, 214 East Clay Street, Richmond 19, Virginia.

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Assistant Attorney General

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 592

COCHEYSE J. GRIFFIN, *etc, et al.*,
Petitioners,
v.
COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, *et al.*,
Respondents.

SUPPLEMENTAL MEMORANDUM FOR THE CITY OF CHARLOTTESVILLE AS AMICUS CURIAE

It is stated in the Supplemental Memorandum for the United States (p. 4):

> "These petitioners seem also to have abandoned any broad attack on the Virginia tuition grant statute and to confine themselves—as does the United States—to seeking an injunction against the use of such grants in Prince Edward County. . . ."

The City of Charlottesville, on the basis of the argument before the Court, is of the same opinion, but if it should later appear that petitioners have not abandoned their general attack on the program, we would respectfully ask the Court to consider the following.

It is the thought of the City that the oral argument may

have left with the Court an impression that the present scholarship aid statutes of the State of Virginia are a residual portion of the 1956 "massive resistance" legislative package and had therefore been enacted as part of a plan to maintain segregation in the Virginia schools. As our brief will demonstrate (pp. 2-5) the present tuition grant program is a product of the abandonment in 1959 of the earlier policy of "massive resistance," and its statutory purpose—to whatever extent such intent may be relevant—was to withdraw the State from any further activity in support of segregation in the schools; an intent which we believe is fully exemplified by the operation of the program since its enactment (Br. pp. 6-10).

Respectfully submitted,

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